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In The
Supreme Court of the United States

THEODORE KOZIOL and LOIS KOZIOL,

Petitioners,

vs.

BOMBARDIER-ROTAX GmbH MOTORENFABRIK; KODIAK RESEARCH, LTD.; ROTECH RESEARCH CANADA, LTD., a/k/a KODIAK RESEARCH CANADA, LTD.; AERO DISTRIBUTION LIMITED; AERO DISTRIBUTION INTERNATIONAL LIMITED; and PASCAL RONVEAUX,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. a. *Whether a regional circuit court of appeals, in an appeal from a final judgment by a transferee district court, can provide appellate relief involving a pre-transfer ruling by a transferor district court located in another regional circuit?*

(The United States Court of Appeals for the Eleventh Circuit has answered this Question in the negative, as has the United States Court of Appeals for the Tenth Circuit. The United States Courts of Appeals for the Second, Fifth, Sixth, and Ninth Circuits have answered this Question in the affirmative.)

b. *If (a) is answered in the affirmative, which view of "stream of commerce" in Asahi Metal is to be applied to the issue of specific personal jurisdiction?*

(The United States Courts of Appeals for the First, Sixth, and Eleventh Circuits have applied Justice O'Connor's four-justice plurality opinion, while the United States Court of Appeals for the Eighth Circuit has applied both Justice Brennan's four-justice concurring opinion and Justice Stevens' three-justice concurring opinion, and the United States Courts of Appeals for the Third, Fifth, and Ninth Circuits have avoided having to follow any specific one of the three opinions in *Asahi Metal*.)

2. *Whether the reasonableness analysis under Asahi Metal, a specific personal jurisdiction case, applies to a case asserting general personal jurisdiction; and if so, whether the defendant has any burden of proof?*

QUESTIONS PRESENTED – Continued

(The United States Court of Appeals for the Eleventh Circuit has answered the initial Question in the affirmative, and the second in the negative. The United States Courts of Appeals for the Second, Fourth, Eighth, and Ninth Circuits have answered the initial Question in the affirmative, although the Ninth Circuit answers the second Question in the affirmative, while the Eighth Circuit answers in the negative.)

LIST OF ALL PARTIES IN COURT BELOW

Individuals:

Theodore Koziol

Lois Koziol

Pascal Ron[illegible]aux

Business Entities:

Bombardier-Rotax GmbH Motorenfabrik

Kodiak Research, Ltd.

Rotech Research Canada, Ltd., a/k/a Kodiak Research Canada, Ltd.

Aero Distribution Limited

Aero Distribution International Limited

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners, Theodore Koziol ("Dr. Koziol") and Lois Koziol, respectfully pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit rendered in this case on April 22, 2005, on which rehearing was denied on August 17, 2005.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit filed April 22, 2005 is not officially reported, but does appear at 129 Fed. Appx. 543 (11th Cir. 2005), and is reproduced in Appendix A to this Petition beginning on page 1a. The opinion of the United States District Court for the Southern District of Florida filed March 27, 2004, dismissing the Complaint is unreported and is reproduced in Appendix B to this petition, beginning at page 9a. The Order of the United States Court of Appeals for the Eleventh Circuit dismissing the part of the appeal seeking review of the jurisdictional ruling of the United States District Court for the District of New Jersey is unreported, and is reproduced in Appendix C to this Petition, beginning on page 15a. The opinion of the United States District Court for the District of New Jersey, filed May 22, 2003, modifying its dismissal order and transferring the case to the Southern District of Florida, is unreported and is reproduced in Appendix D to this Petition, beginning at page 17a. The opinion of the United States District Court for the District of New Jersey dated April 24, 2004, dismissing the Complaint, is unreported and is

reproduced in Appendix E to this Petition, beginning at page 20a. The opinion denying rehearing filed August 17, 2005, is unreported and is reproduced in Appendix F to this Petition, beginning on page 40a.

JURISDICTION

The judgment in the United States Court of Appeals for the Eleventh Circuit was entered on April 22, 2005. Pet.App. 1a. The Petition for Panel Rehearing (timely filed on May 13, 2005) was denied on August 17, 2005. Pet.App. 20a; 11th Cir.R. 40-3 (21 days). The jurisdiction of this Court is timely invoked within 90 days thereof, pursuant to 28 U.S.C. §1254(1) (1988) and SUP. CT. R. 13.4.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this case – the Fifth and Fourteenth Amendments to the United States Constitution, 28 U.S.C. §§1291, 1294(1), and FLA. STAT. §48.193(2) – are set forth in Appendix G beginning at page 41a.

STATEMENT OF THE CASE

A. *Legal Result Sought by Petitioner:*

A ruling that specific personal jurisdiction lies in New Jersey and that general personal jurisdiction lies in Florida, in this products liability case involving diversity

of citizenship between two New Jersey plaintiffs and a set of foreign (non-U.S.) businesses and a foreign individual.

B. *Origin and History of Case:*

On March 29, 1999, Petitioner Theodore Koziol was a passenger aboard an ultra-light aircraft operated by Vincent Vitollo near Lakewood, New Jersey. The aircraft crashed, killing Mr. Vitollo and injuring Dr. Koziol. The aircraft was powered by an engine, model 582-UL, designed and manufactured by Respondent Bombardier-Rotax, GmbH, Motorenfabrik (hereafter "Rotax"). Pet.App. 21a.

Mr. Vitollo had bought the engine from South Mississippi Light Aircraft, one of four Rotax dealers in the United States (hereafter "the Mississippi dealer"). Pet.App. 22a. The Mississippi dealer purchased the engine from Respondent Kodiak Research, Ltd., a Bahamian business (hereafter "Kodiak"), which is the distributor of Rotax engines for North, Central, and South America, excluding Canada. Pet.App. 22a.

Dr. Koziol and his wife, Petitioner Lois Koziol [citizens of New Jersey], filed a products liability action under diversity of citizenship against the engine manufacturer (Rotax), the sole distributor for the United States (Kodiak), and others (all foreign persons or entities) in the United States District Court for the District of New Jersey. Pet.App. 21a. This Petition for Certiorari seeks relief only as to the Austrian manufacturer (Rotax) and its Bahamian distributor (Kodiak). SUP. CT. R. 12.6.

The New Jersey district court allowed jurisdictional discovery and then dismissed the complaint, finding no personal jurisdiction, either specific or general, over the

foreign defendants. Pet.App. 21a-39a. Upon timely motion to alter, amend, or vacate, the New Jersey district court modified its prior ruling and transferred the case to the United States District Court for the Southern District of Florida. Pet.App. 17a-18a.

When the case arrived in the transferee district, the Florida district court proceeded to rule on a new round of dismissal motions prior to any further jurisdictional discovery. The complaint was again dismissed for lack of personal jurisdiction, both general and specific. Pet.App. 9a-14a.

On appeal to the United States Court of Appeals for the Eleventh Circuit, the regional circuit dismissed the portion of the appeal seeking review of the pre-transfer jurisdictional ruling by the transferor district court. The Eleventh Circuit held that it had no appellate jurisdiction over such rulings by a transferor district court located in another regional circuit, i.e., the Third Circuit. Pet.App. 15-16a.

The Eleventh Circuit subsequently affirmed the Florida district court's dismissal of the case [Pet.App. 1a-8a], and denied a timely petition for panel rehearing. Pet.App. 40a.

C. *Jurisdictional Facts Disclosed During New Jersey Discovery:*

Respondent Bombardier-Rotax GmbH, Motorenfabrik [hereafter "Rotax"] is an Austrian business that manufactures numerous types of engines.[1] The aircraft that

[1] Pet.App. 50a, 52a, 53a.

crashed in 1999 in this case used an engine for ultralight aircraft manufactured by Rotax in Austria.[2] The U.S. Federal Aviation Administration ("FAA") provided evidence of FAA certification to Rotax for four engine models pursuant to a bilateral agreement between the United States and Austria, but not the engine model at issue.[3] Rotax also registered its word mark "Bombardier-Rotax" and trademark design in 1993 with the U.S. Patent and Trademark Office.[4] Rotax manufactures engines for numerous other products that are sold and used by consumers in America, and particularly in Florida and New Jersey. These include the engines for Sea-Doos, a popular jet ski watercraft; the engine for a motorcycle by BMW; and an engine for an all-terrain vehicle ("ATV") by Abrilla.[5]

For the aircraft engine type at issue and several other aircraft engines (including FAA certified engines), Rotax has a single distributer for the Americas, excluding Canada. Since 1992, this has been Respondent Kodiak Research Ltd., a Bahamian business [hereafter "Kodiak"].[6]

As the distributer, Kodiak is responsible for all advertising in its area of distribution, including the United States, as part of North America. However, prior to circulating any ads with the Rotax name or logo in it, Kodiak must get pre-authorization from Rotax. A violation of this contractual obligation of pre-authorizing ads with the

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[2] Pet.App. 21a.

[3] Pet.App. 67a-69a.

[4] Pet.App. 103a-104a.

[5] Pet.App. 53a-55a.

[6] Pet.App. 19a-20a, 56a, 58a, 69a, 70a.

Rotax logo carries the authorized penalty of termination of Kodiak's entire distribution contract.[7]

The Distributor Agreement between Rotax and Kodiak further provides that Kodiak will obtain and keep in force aviation products liability insurance covering the engines in the amount of Three Million U.S. Dollars (US $3,000,000.00).[8] In exchange, Rotax will indemnify, protect, and save harmless Kodiak from any liability, damages, and attorney fees for any failure by Rotax in the manufacture of the engines.[9]

Each year, Kodiak ships approximately one thousand ultralight (non-certified) engines, manufactured by Rotax, into the United States for use in ultra-light aircraft.[10] All one thousand enter the United States each year through Port Everglades, Florida, including the engine at issue in this case.[11] Kodiak has warehouse space in Ft. Lauderdale, Florida[12] and has also used a hangar at the old Executive Airport in Ft. Lauderdale, Florida, from which Kodiak itself sold water-damaged engines.[13]

Kodiak has four authorized dealers in the United States to sell Rotax engines, located in Florida, Mississippi, Wisconsin, and California.[14]

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[7] Pet.App. 45a, 59a, 62a-63a, 64a, 105a-106a.

[8] Pet.App. 47a.

[9] Pet.App. 46a-47a.

[10] Pet.App. 88a.

[11] Pet.App. 74a, 90a-91a.

[12] Pet.App. 93a-94a.

[13] Pet.App. 94a.

[14] Pet.App. 60a-61a, 84a.

The Distributor Agreement between Rotax and Kodiak requires Kodiak to supervise the dealers to honor Rotax's warranty on the engines and perform repairs at no cost to the customers.[15] The Florida dealer thus receives compensation directly from Kodiak for any warranty work done by the Florida dealer on Rotax engines shipped by Kodiak and brought back in by a customer to the Florida dealer for repairs and service.[16] Kodiak is then reimbursed by Rotax for this warranty work.[17]

The Florida dealer has purchased advertising space in *Ultralight Flying!*, a trade magazine, 97 times between 1995 and 2002 for marketing Rotax engines and using the Rotax name and logo. The Mississippi dealer also purchased advertising space in *Ultralight Flying!* 84 times in the same relevant years, also using the Rotax name and logo. *Ultralight Flying!* has a national distribution, with 187 subscribers in New Jersey.[18] The dealers received the Rotax logo from Kodiak.[19] As noted above, all use of the Rotax logo requires pre-authorization by Rotax.[20] Rotax is also aware that the Experimental Aircraft Association distributes a flying magazine in the U.S., and knows that Rotax advertisements run in it.[21]

The Experimental Aircraft Association has two main air shows annually for ultralight aircraft: (a) Oshkosh,

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[15] Pet.App. 47a.

[16] Pet.App. 78a, 80a.

[17] Pet.App. 51a, 66a.

[18] Pet.App. 99a-100a.

[19] Pet.App. 77a.

[20] *See* footnote 7, *supra*.

[21] Pet.App. 64a.

Wisconsin, and (b) Sun 'N' Fun in Lakeland, Florida.[22] The Rotax Vice President for Aircraft Engines from 1998 to 2002 (inclusive of the date of Dr. Koziol's 1999 plane crash) was Mr. Josef Furlinger.[23] This Vice President for Aircraft Engines testified that he personally travelled to Florida to attend the Sun 'N' Fun annual air show two or three times during these four years as Vice President for Aircraft. On these occasions, he was at the Rotax booth, set up by the Florida dealer. There were Rotax logos all around.[24] As noted, *supra*, the Florida dealer testified that he received the Rotax logos from Kodiak. The Florida dealer further testified that he was prohibited from using any logos in the booth at that annual ultralight air show other than Rotax, as an express condition of continuing on as a dealer of Rotax engines. He also testified that Kodiak personnel attended the Sun 'N' Fun air shows annually and had their own booth. Indeed, in various years, Kodiak provided Rotax engines for the Florida dealer to use as displays in his separate booth at the Florida air show.[25] Mr. Furlinger saw the Rotax engines at Rotax's booth.[26] Pascal Ronveaux, the President of Kodiak, has travelled to Florida to attend the annual air show, Sun 'N' Fun, a number of times.[27]

Mr. Furlinger, of Rotax, testified that if a customer or dealer in the United States has a technical question, this is directed to Kodiak. If Kodiak has further technical

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[22] Pet.App. 68a.

[23] Pet.App. 52a, 54a, 105a-106a.

[24] Pet.App. 68a-69a.

[25] Pet.App. 75a,76a.

[26] Pet.App. 69a.

[27] Pet.App. 89a.

questions on the problem, Kodiak contacts the after-sales department at Rotax, which then provides the answer.[28]

Rotax requires Kodiak to investigate accidents involving Rotax engines, according to Mr. Furlinger. Kodiak's responsibility to investigate such accidents in the United States, which is part of its territory, arises under the Distribution Agreement. Eric Tucker, of Kodiak, represented Rotax in the National Transportation Safety Board's investigation of the aircraft crash at issue in New Jersey involving Dr. Koziol.[29]

The Florida dealer testified that he also had numerous dealings with Mr. Tucker from Kodiak, including numerous visits by Mr. Tucker to the Florida dealer's place of business in Lakeland, Florida to provide service clinics and other services. Additionally, Mr. Ronveaux, the President of Kodiak, has travelled to the Florida dealership one or more times each year, and has made multiple other business trips to Florida.[30]

Kodiak's principals receive U.S. mail in Florida, in care of Kodiak's Florida freight forwarder. Periodically the Florida freight forwarder will forward this mail via the Bahamian freight forwarder to Kodiak's principals, the Ronveaux family, in the Bahamas.[31]

Rotax also requires Kodiak to provide after-sale service and spare parts through the four dealers in the United States. Mr. Furlinger testified that Rotax sells

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[28] Pet.App. 69a-70a.

[29] Pet.App. 70a, 107a-108a.

[30] Pet.App. 82a, 89a.

[31] Pet.App. 91a-92a.

spare parts to Kodiak and Kodiak is required to have them available in the United States through its dealers. Mr. Furlinger has personally met all four American dealers. The four dealers are the only four authorized service centers for Rotax engines in the United States, which necessarily includes the Mississippi and Florida dealers.[33] Indeed, the purpose of requiring Kodiak to have U.S. dealers is for U.S. customers to have access to Rotax spare parts.[33]

Mr. Furlinger further testified that Rotax provides the manufacturer's suggested retail price ("MSRP") to Kodiak.[34] Kodiak then passes the MSRP on to its four U.S. dealers. The Florida dealer testified that it uses the MSRP it receives from Kodiak.[35]

When Rotax manufactures the ultralight aircraft engine, it puts its operating manual in the box with the engine. The operator's manual includes a limited warranty from Rotax.[36] When Kodiak receives the engine kit, it then ships the same unopened box into Florida, and from there it goes to one of the four authorized dealers, including the Florida dealer.[37] This is the warranty that the Florida dealer testified the dealers have to service and under which he is reimbursed directly by Kodiak when he does warranty work on a Rotax engine.[38]

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[33] Pet.App. 48a-49a, 56a-58a, 59a, 60a-61a.

[33] Pet.App. 60a.

[34] Pet.App. 61a.

[35] Pet.App. 76a-77a.

[36] Pet.App. 65a-66a.

[37] Pet.App. 85a-86a.

[38] Pet.App. 78a-80a.

D. *Additional Data on Subjecting Rotax to Litigation in the United States:*

In addition to the instant case, Rotax and Kodiak have participated in other products liability cases, sometimes (but not always) successfully contesting personal jurisdiction. Published cases on this point are: *Simeone v. Bombardier-Rotax, GmbH*, 360 F.Supp.2d 665 (E.D. Pa. 2005); *White v. Bombardier Corp.*, 313 F.Supp.2d 1295 (N.D. Fla. 2004); *Goodchild v. Bombardier-Rotax, GmbH*, 979 S.W.2d 1 (Tex. App. 14th Dist. 1998); *Haedike v. Kodiak Research, Ltd.*, 814 F.Supp. 679 (N.D. Ill. 1993); *Thomas v. Bombardier-Rotax Motorenfabrik, GmbH*, 869 F.Supp. 551 (N.D. Ill. 1994).

REASONS FOR GRANTING THE WRIT

I. A. THE CIRCUITS ARE SPLIT ON APPELLATE REVIEW OF A PRE-TRANSFER RULING BY A TRANSFEROR DISTRICT COURT LOCATED IN A DIFFERENT REGIONAL CIRCUIT.

In the case at bar, Petitioners' Complaint was dismissed by the District Court for the District of New Jersey, on the issue of both specific and general personal jurisdiction.[39] On a timely motion to alter, amend, or vacate by Petitioners, the New Jersey district court transferred the case to the District Court for the Southern District of Florida.[40] Meanwhile, Petitioners had filed a savings action in the United States District Court for the Southern

[39] Pet.App. 20a-39a.

[40] Pet.App. 17a-19a.

District of Florida. When the transferred New Jersey case arrived in the transferee district, the two cases were consolidated.[41] The Florida district court thereafter dismissed the consolidated cases for a lack of both general and specific personal jurisdiction.[42]

Following dismissal of the consolidated cases, Petitioners sought appellate review of the New Jersey district court's ruling, as well as the Florida district court's ruling. However, the Court of Appeals for the Eleventh Circuit dismissed the part of the appeal involving the New Jersey pre-transfer rulings, finding a lack of appellate jurisdiction as to rulings by a district court not located in the Eleventh Circuit.[43]

The normal rule is that interlocutory orders are not subject to immediate appellate review, but can obtain effective review on appeal from the final judgment. *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375 (1987); *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430 (1985). Transfer orders are regularly held by the regional circuits to be interlocutory orders not subject to immediate review. *E.g.*, *Carteret Sav. Bank v. Shushan*, 919 F.2d 225, 228-30 (3rd Cir. 1990); *Stelly v. Employers Nat'l Ins. Co.*, 431 F.2d 1251, 1254 (5th Cir.), *cert. denied*, 401 U.S. 908 (1971); *United States Fire Ins. Co. v. American Family Assur. Co.*, 787 F.2d 438, 439 (8th Cir. 1986); *In re Kemble*, 776 F.2d 802, 806 & n.5 (9th Cir. 1985).

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[41] Pet.App. 3a-4a, 9a.

[42] Pet.App. 9a-14a.

[43] Pet.App. 15a-16a.

However, once a final judgment or final order of dismissal is entered, the regional circuit courts of appeals are split on the reviewability of pre-transfer rulings by transferor district courts located in a different regional circuit. The Eleventh Circuit dismissed the part of Petitioners' appeal that sought review of the New Jersey district court's ruling on lack of specific and general personal jurisdiction in New Jersey, citing the Eleventh Circuit's prior opinion in *Roofing & Sheet Metal Services, Inc. v. LaQuinta Motor Inns*, 689 F.2d 982, 986 (11th Cir. 1982). Another regional circuit that denies appellate review of pre-transfer rulings by transferor district courts located in other regional circuits is the Tenth Circuit Court of Appeals: *McGeorge v. Continental Airlines, Inc.*, 871 F.2d 952, 954 (10th Cir. 1989).

Petitioners respectfully submit that the better view, which should have obtained in their case, is the rule applied by regional circuit courts of appeals that find appellate jurisdiction to review pre-transfer rulings by a transferor district court located in a different regional circuit. These are the Courts of Appeals for the Second Circuit: *Chaiken v. VV Publishing Corp.*, 119 F.3d 1018, 1025 n.2 (2nd Cir. 1997) [review of pre-transfer order of outside district court dismissing two defendants for lack of personal jurisdiction]; Fifth Circuit: *Tel-Phonic Services, Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1138 (5th Cir. 1992) [review of pre-transfer order of outside district court dismissing RICO claims, even though issue not reconsidered by transferee district court]; Sixth Circuit: *Equal Employment Opportunity Comm'n v. Northwest Airlines, Inc.*, 188 F.3d 695, 700 (6th Cir. 1999) [review of pre-transfer order of outside district court granting summary judgment on one claim and dismissing other claims]; and

the Ninth Circuit: *American Fidelity Fire Ins. Co. v. United States Dist. Ct., N.D. Calif.*, 538 F.2d 1371, 1377 n. 4 (9th Cir. 1976) [review of transfer order by outside district court, on appeal from final judgment in transferee district court].

The underlying concept for the appellate authority to review pre-transfer orders is that the transfer of a case ships it out to the transferee district court "lock, stock, and barrel". *Astarte Shipping Co. v. Allied Steel & Export Svc.*, 767 F.2d 86, 87 (5th Cir. 1985).

As stated by Judge Learned Hand:

> The review of any order of the district court in a transferred case, made before transfer, is within the jurisdiction of the court of appeals of the circuit to which the cause has been transferred.

Magnetic Engineering & Mfg. Co. v. Dings, 178 F.2d 866, 870 (2nd Cir. 1950), *quoted in Astarte Shipping Co. v. Allied Steel & Export Svc.*, 767 F.2d at 87.

Petitioners respectfully submit that a half century later, the analysis by Judge Hand is still cogent and should be the rule in all circuits. Petitioners thus submit that the Petition should be granted in order to resolve this split among the Circuits.

B. IF THE PRE-TRANSFER JURISDICTIONAL RULING IS APPEALABLE AFTER TRANSFER, IT IS TIME TO CLARIFY WHICH APPROACH IN *ASAHI METAL* TO "STREAM OF COMMERCE" APPLIES IN SPECIFIC PERSONAL JURISDICTION CASES.

In *Asahi Metal Industry Co., Ltd. v. Superior Court of Calif., Solano Co.*, 480 U.S. 102 (1987) [hereafter *Asahi Metal*], this Court addressed the issue of "stream of commerce" in the context of specific personal jurisdiction over an indemnity cross-claim between two non-U.S. litigants. The case at bar is a products liability claim by U.S. citizens against an Austrian manufacturer and a Bahamian distributor.

The four-justice plurality opinion by Justice O'Connor held, in Part II-A of *Asahi Metals*, that minimum contacts required more than just placing a product in the "stream of commerce". Part II-A of the plurality opinion gave examples of the "plus" factors that could result in a finding of specific personal jurisdiction, including:

> designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.

480 U.S. 112 (O'Connor, J.) (plurality).

The four-justice concurring opinion by Justice Brennan disagreed with Part II-A of the plurality opinion in *Asahi Metal*. This concurring opinion concluded that placing a product into the stream of commerce is sufficient to constitute purposeful activity directed toward the forum

State "as long as the participant in the process is aware that the final product is being marketed in the forum State . . . " because "the possibility of a lawsuit there cannot come as a surprise . . . nor will the litigation present a burden for which there is no corresponding benefit." 480 U.S. 117 (Brennan, J.) (concurring).

There was also a separate three-justice concurring opinion by Justice Stevens[4] which likewise disagreed with Part II-A of the plurality opinion. Concluding that Part II-A misapplied the facts in *Asahi Metal*, Justice Stevens looked to "purposeful availment" and stated:

> In most circumstances, I would be inclined to conclude that a regular course of dealing that results in deliveries of over 100,000 units annually over a period of several years would constitute "purposeful availment" even though the item delivered to the forum State was a standard product marketed throughout the world.

480 U.S. 122 (Stevens, J.) (concurring).

Some regional circuit courts of appeals cite Part II-A of the *Asahi Metal* plurality opinion, without more, in dismissing for lack of specific personal jurisdiction, including the First Circuit in *Boit v. Gar-Tec Products*, 967 F.2d 671, 683 (1st Cir. 1992); and the Eleventh Circuit in *Madara v. Hall*, 916 F.2d 1510, 1519 (11th Cir. 1990). The Sixth Circuit applied the plurality opinion to uphold personal jurisdiction in *Tobin v. Astra Pharmaceutical Products, Inc.*, 993 F.2d 528, 543-544 (6th Cir. 1993).

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[4] Justices White and Blackmun joined both concurring opinions. 480 U.S. 117 & 122.

However, Petitioners respectfully submit that the view of stream of commerce set out in the two concurring opinions in *Asahi Metal* by Justices Brennan and Stevens should control. Thus, the Eighth Circuit, in *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 613-15 (8th Cir. 1994), correctly applied both concurring opinions of Justices Stevens and Brennan in finding minimum contacts under their "stream of commerce" analyses. Under this approach, Petitioners' case should have been sustained on the jurisdictional challenges below.

Other regional circuits have avoided choosing one position over another, including the Third Circuit in *Pennzoil Products Co. v. Colelli & Assoc., Inc.*, 149 F.3d 197, 206-207 (3rd Cir. 1998); the Fifth Circuit in *Ruston Gas Turbines, Inc. v. Donaldson Co., Inc.*, 9 F.3d 415, 420 (5th Cir. 1993); and the Ninth Circuit in *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 382 n.3 (9th Cir.), *rev'd on other grounds*, 499 U.S. 585 (1991).[45] The Fifth Circuit, for example, looked to *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), in order to analyze minimum contacts under the "stream of commerce" theory. *Ruston Gas*, 9 F.3d 420. The Third and Ninth Circuits try to harmonize Justice O'Connor's plurality opinion in Part II-A of *Asahi Metal* with Justice Brennan's concurring opinion. *Colelli & Assoc.*, 149 F.3d 206-207; *Shute*, 897 F.2d 382 n.3.

In the case at bar, the New Jersey district court applied a restrictive reading of only the plurality opinion

[45] Certiorari was granted on the minimum contacts issue, but it was not reached because a non-constitutional issue resolved the case. 499 U.S. 589-590.

from *Asahi Metal*, on specific personal jurisdiction over the Respondents.[46] The facts as to "minimum contacts" show that Rotax manufactures multiple types of engines that enter the stream of commerce into the United States, including ten types of aircraft engines.[47] Rotax has set up a channel of distribution for these ten models of aircraft engines to enter the United States via a single Bahamian distributor, Kodiak, and Kodiak's four dealers in the United States.[48]

> Q: Did the territory in the United States that Rotax gave Kodiak for sale of Rotax engines include the state of New Jersey?
>
> A: We did not specify any specific state. But, it means the entire U.S.
>
> Q: It means all the states of the U.S., is that a fair statement?
>
> A: That's a fair statement.[49]

Rotax expects them to be aggressive in market penetration.[50] The distributor and the four dealers have been required to use the Rotax logo in their advertising since 1998.[51] Mr. Furlinger, as Vice President for Aircraft at Rotax, has required them to submit their advertisements to Rotax in advance for approval.[52] The Mississippi and

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[46] Pet.App. 27a-33a.

[47] Pet.App. 50a.

[48] Pet.App. 55a-56a, 60a, 70a, 84a.

[49] Pet.App. 56a.

[50] Pet.App. 59a.

[51] Pet.App. 105a-106a.

[52] Pet.App. 62a-63a, 64a, 105a-106a.

Florida dealers have been advertising Rotax ultra-light engines like the one in Dr. Koziol's air crash for a number of years, for example, running 84 and 97 ads, respectively, between 1995 and 2002, in the trade magazine targeting users of ultra-light aircraft engines in experimental aircraft. This trade magazine has 187 subscribers in New Jersey.[53] Rotax is also aware that the Experimental Aircraft Association distributes a flying magazine in the U.S., and knows that Rotax advertisements are in it.[54]

Moreover, Kodiak has the responsibility of making spare parts available throughout the United States, including New Jersey.[55] This is why Rotax requires Kodiak to have U.S. dealers.[56] These four dealers are the only authorized Service Centers for Rotax engines in the United States.[57] As to after-sales customer service, if a customer has a technical question, the customer is directed to Kodiak, but if Kodiak cannot answer it, the customer is directed to the Rotax factory in Austria for the answer.[58]

The air crash at issue occurred in 1999 in New Jersey.[59] The engine was purchased by the owner and pilot of the aircraft, Mr. Vitollo, from the Mississippi dealer, who bought it from Kodiak.[60]

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[53] Pet.App. 99a-100a.

[54] Pet.App. 64a.

[55] Pet.App. 57a, 58a.

[56] Pet.App. 60a-61a.

[57] Pet.App. 61a.

[58] Pet.App. 69a-70a.

[59] Pet.App. 21a.

[60] Pet.App. 22a.

Although Rotax is an Austrian business,[61] Rotax registered its wordmark and logo with the United States Patent and Trademark Office in 1993.[62] Rotax has also succeeded in having four of its ten aircraft engine models certified by the United States Federal Aviation Administration, pursuant to a bilateral agreement between Austria and the United States,[63] although the engine model at issue is uncertified.

Anticipating air crashes in the United States, Rotax requires its distributor, Kodiak, to investigate such crashes. Thus, Kodiak had one of its principals, Eric Tucker, sit on the National Transportation Safety Board investigation of the air crash at issue.[64]

Kodiak annually ships one thousand aircraft engines into the United States, of the type involved in Dr. Koziol's air crash.[65] These 1,000 aircraft engines then go to the four authorized dealers, which each have authority to sell anywhere in the United States.[66] Indeed, the Mississippi dealer sold the engine at issue to Mr. Vitollo in New Jersey.[67]

As to the "reasonableness" and "fairness" of subjecting Rotax and/or Kodiak to personal jurisdiction in New Jersey, New Jersey has an interest in providing a forum to

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[61] Pet.App. 52a-53a.

[62] Pet.App. 103a-104a.

[63] Pet.App. 67a-68a.

[64] Pet.App. 70a, 107a-108a.

[65] Pet.App. 88a.

[66] Pet.App. 74a, 90a-91a.

[67] Pet.App. 22a.

its citizens who are injured by defective products in the State of New Jersey. *Asahi Metal*, 480 U.S. 113-115.

Rotax and Kodiak are each international businesses. Rotax would be burdened by litigating in the United States, but has anticipated this by requiring Kodiak to carry U.S. $3,000,000 in aviation products liability insurance.[68] In turn, Rotax has agreed to indemnify Kodiak from any losses due to faulty manufacturing by Rotax.[69] As noted, *supra* at 11, Rotax has been litigating products liability cases for a number of years in the United States.

In addition to liability insurance for products liability cases in U.S.-denominated dollars, Kodiak sends Mr. Tucker and Mr. Ronveaux into the United States on a regular basis in connection with these Rotax aircraft engines. Kodiak's burden in having to litigate in the United States, like that of Rotax, is ameliorated by the insurance and also by Rotax's indemnity. Like Rotax, Kodiak has been litigating products liability cases for a number of years in the United States. *Supra* at 11.

Petitioners have an interest in having a New Jersey-based court decide their case. Unlike Rotax and Kodiak, which are international businesses dealing in large quantities of engines in international commerce, Dr. and Mrs. Koziol are individuals with an obvious disadvantage in economic staying power if they had to travel overseas for extensive litigation.

The reasonableness test under *Asahi Metal* falls in favor of Petitioners. It is the split over how the "stream of

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[68] Pet.App. 47a.

[69] Pet.App. 46a-47a.

commerce" theory applies to minimum contacts under *Asahi Metal* that should be resolved. Petitioners submit that the view of two concurring opinions in *Asahi Metal* and the Eighth Circuit in *Barone* are correct on the application of "stream of commerce". The Petition should be granted to resolve the split of authority, both on this Court and in the Circuits.

II. IT IS TIME TO CLARIFY WHETHER THE ANALYSIS OF GENERAL PERSONAL JURISDICTION INCLUDES THE *ASAHI METAL* APPROACH; AND IF SO, TO RESOLVE THE SPLIT IN THE CIRCUITS ON BURDEN OF PROOF.

This Court has addressed general personal jurisdiction in *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), and *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984). This type of personal jurisdiction allows a defendant to be required to respond to and defend a civil action in a State where the defendant has "continuous and systematic" contacts with the forum State even though the cause of action arose elsewhere. *Helicopteros*, 466 U.S. 416.

As an initial matter, the plaintiff need not have "minimum contacts" with the forum State. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 (1984).

Even if the cause of action does not arise out of or relate to a foreign corporation's activities in the forum State, general personal jurisdiction may be found when there are "sufficient contacts between the State and the foreign corporation". *Helicopteros*, 466 U.S. 414.

In *Perkins*, the diversity action was filed in Ohio, where the Philippine corporate defendant had set up a partial corporate headquarters during the Japanese occupation of the Philippine Islands during World War II. 342 U.S. 447-448. The plaintiff was a stockholder suing for unpaid dividends and damages for failure to issue stock certificates. 342 U.S. 439. None of the acts or omissions occurred in Ohio, but this Court upheld personal jurisdiction. 342 U.S. 448-449. There was no discussion of "reasonableness" or "fairness" such as occurs in specific personal jurisdiction cases. *Compare Perkins, supra, with World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); *Asahi Metal Industry Co., Ltd. v. Superior Court of Calif., Solano Co.*, 480 U.S. 102, 113 (1987).

In *Helicopteros*, this Court was confronted with a civil action in Texas against a buyer of goods who was located in Colombia. The cause of action was for an air crash in Peru, involving a helicopter owned by the foreign defendant, which had previously purchased helicopters in Texas, and had various employees trained in Texas. The defendant did not solicit business in Texas, had no office in Texas, and had occasional other contacts with Texas. 466 U.S. 410-412. This Court followed *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516, 518 (1923), which held that a purchaser in Oklahoma of goods in New York, absent other significant contacts, was not subject to personal jurisdiction in New York. *Helicopteros*, 466 U.S. 417.

The case at bar involves a foreign manufacturer of aircraft engines and its foreign distributor, which sell aircraft engines and other engines to American customers. Petitioners sought to establish general personal jurisdiction in Florida, after transfer to the Florida district court. The pertinent Florida statute states:

> A defendant who is engaged in substantial and not isolated activity within this State, whether such activity is wholly interstate, intrastate, or otherwise, is subject to the jurisdiction of the courts of this State, whether or not the claim arises from that activity.

FLA. STAT. §48.193(2).

The Florida District Court of Appeals has held that this statute eliminates the need for "connexity" in a case of general personal jurisdiction. *Universal Caribbean Establishment v. Bard*, 543 So.2d 447, 448 (Fla.App. 4th Dist. 1989). Meeting the requirement of "substantial and not isolated activity" under this statute satisfies the due process requirement of minimum contacts, under Florida case law. *Nichols v. Paulucci*, 652 So.2d 389, 391 (Fla.App. 5th Dist. 1995). *See also AutoNation, Inc. v. Whitlock*, 276 F.Supp.2d 1258, 1262 (S.D.Fla. 2003).

The case at bar involves foreign business entities which manufacture and ship products for sale to customers in the United States market. As discussed *supra*, market penetration begins with thousands of aircraft engines entering the United States market via Port Everglades, Florida.[70] The established channels of distribution include a Florida dealer.[71]

Rotax and Kodiak are also involved in marketing these products in Florida, as shown by the provision of the Rotax logo to the Florida dealer, and Rotax's requirement of pre-authorization for each advertisement using the

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[70] Pet.App. 74a, 88a, 90a-91a.

[71] Pet.App. 74a, 84a.

logo[72] (which itself has been registered with the United States Patent and Trademark Office since 1993[73]). The logo appears nationally (thus, including Florida) in magazine ads by the Florida dealer as well as the other Rotax dealers.[74]

The Experimental Aircraft Association has an annual air show for ultra-light aircraft Sun 'N' Fun, in Lakeland, Florida.[75] Rotax attends the airshow in Florida. Kodiak attends and also has a booth at this annual airshow. Kodiak has provided Rotax engines to the Florida dealer to display at the Florida air show. Both Rotax and Kodiak require the exclusive use of the Rotax logo by the Florida dealer at this air show.[76]

Rotax also manufactures engines for BMW motorcycles, Sea Doos, and ATVs, all of which are sold through 43 non-aviation dealers in Florida.[77]

Kodiak has maintained a warehouse in Ft. Lauderdale, Florida, and has directly sold water damaged engines at the Ft. Lauderdale executive airport.[78] Kodiak's President, Pascal Ronveaux, attends the annual Florida air show, regularly visits the Florida dealer, visits Florida for other business, and receives U.S. mail in care of his Florida freight forwarder in Ft. Lauderdale, Florida, who then sends it to Mr. Ronveaux in the Bahamas (via a

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[72] Pet.App. 45a, 59a, 62a-63a, 64a, 105a-106a.

[73] Pet.App. 103a-104a.

[74] Pet.App. 99a-100a.

[75] Pet.App. 68a.

[76] Pet.App. 68a-69a, 75a-76a.

[77] Pet.App. 53a-55a, 101a-102a.

[78] Pet.App. 93a-94a.

related Bahamian freight forwarder).[79] Kodiak's other principal, Eric Tucker, visits Florida regularly to provide service to the Florida dealer, as well as attend the annual air show.[80]

The Florida district court assumed, without deciding, that general personal jurisdiction was present,[81] as did the Court of Appeals for the Eleventh Circuit.[82] However, both the district court and the court of appeals, using Part II-B of *Asahi Metal*, found that it would be unreasonable to require Rotax and Kodiak to defend in Florida, focusing on the single engine involved in Dr. Koziol's air crash,[83] although this is not part of the *Helicopteros* analysis for general personal jurisdiction.

Even though *Asahi Metal* and *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), were specific personal jurisdiction cases, some regional circuits have applied their requirement of "reasonableness" after having found "minimum contacts" for general personal jurisdiction. *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 573-575 (2nd Cir. 1996); *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory"*, 283 F.3d 208, 213-214 (4th Cir.), *cert. denied*, 537 U.S. 822 (2002); *Lakin v. Prudential Securities, Inc.*, 348 F.3d 704, 713 (8th Cir. 2003); *Glencore Grain Rotterdam, B.V. v. Shivath Rai Harnarain Co.*, 284 F.3d 1114, 1125-1126 (9th Cir. 2002). This two-step methodology is not part of the *Perkins* and

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[79] Pet.App. 82a, 89a, 91a-92a.

[80] Pet.App. 82a.

[81] Pet.App. 13a.

[82] Pet.App. 7a-8a.

[83] Pet.App. 7a-8a, 13a.

Helicopteros approach to general personal jurisdiction, and should be expressly rejected by this Court.

The Court of Appeals for the Ninth Circuit requires the foreign defendant, once general personal jurisdiction is found, to present a "compelling case" that the assertion of jurisdiction is unreasonable. *Amoco Egypt Oil Co. v. Leonis Navigation Co., Inc.*, 1 F.3d 848, 851-852 (9th Cir. 1993).

On the other hand, the United States Court of Appeals for the Eighth Circuit does not require a defendant to carry any burden on why exercising jurisdiction might be unreasonable, once minimum contacts are found to support general personal jurisdiction. *Lakin v. Prudential Securities, Inc.*, *supra*. This is also the approach by the Eleventh Circuit in the case at bar.[24]

Given the test of "continuous and systematic" contacts for general personal jurisdiction in *Perkins, supra*, and *Helicopteros*, 466 U.S. 416, and given the lack of any mention of a two-part analysis in those two cases, the approach by the court of appeals was in error. It is respectfully submitted that the Petition be granted, under this Court's supervisory role over the subordinate regional circuit courts of appeals, in order to clarify whether the reasonableness test in Part II-B of *Asahi Metals* applies to general personal jurisdiction cases; and if so, to resolve the split in the Circuits over which party has the burden of proof.

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[24] Pet.App. 7a-8a.

CONCLUSION

The Petition should be granted to clarify these issues and to resolve the splits in the regional circuit courts of appeals.

Respectfully submitted,

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-12041
Non-Argument Calendar

D.C. Docket Nos. 02-61807-CV-JIC & 03-61096-CV-JIC

THEODORE KOZIAL* and
LOIS KOZIOL,

Plaintiffs-Appellants,

versus

BOMBARDIER-ROTAX GMBH,
MOTORENFABRIK, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(Filed April 22, 2005)

Before EDMONDSON, Chief Judge, BLACK and PRYOR, Circuit Judges.

PER CURIAM:

Plaintiffs-Appellants Dr. Theodore Koziol and Lois Koziol appeal the dismissal of their product liability action

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* The correct spelling is "Koziol."

on jurisdictional grounds against Defendants-Appellees Bombardier-Rotax GMBH, Motorenfabrik, ("Rotax"), Kodiak Research, Ltd. ("Kodiak"), and Rotech Research Canada, Ltd. ("Rotax"). No reversible error has been shown; we affirm.

Dr. Koziol was a passenger in an "ultralight" home built aircraft piloted by Vincent Vitollo that crashed near Lakewood, New Jersey, on 20 March 1999, shortly after takeoff. The pilot was killed, and Dr. Koziol injured. The aircraft was powered by a Rotax 582-UL engine that was manufactured by Rotax, an Austrian corporation, in Austria. Dr. Koziol alleges that engine failure caused the crash.

The federal district court sitting in Florida granted Defendants' motion to dismiss based on the absence of personal jurisdiction over the Defendants. We review *de novo* the dismissal of an action for lack of personal jurisdiction. *See Alexander Proudfoot Co. World Headquarters v. Thayer*, 877 F.2d 912, 916 (11th Cir. 1989). Where, as is the case here, the district court conducts no evidentiary hearing on the motion to dismiss, the plaintiff must establish jurisdictional facts sufficient to withstand a motion for directed verdict. *Madara v. Hall*, 916 F.2d 1510, 1514 (11th Cir. 1990). All undisputed facts in the complaint are accepted as true and where facts are contested the court is to draw all reasonable inferences in favor of the plaintiff. *Id.* When a defendant submits affidavits or other materials supporting a meritorious challenge to jurisdiction, the burden falls on the plaintiff to produce sufficient evidence to establish jurisdiction. *See Jet Charter Service, Inc. v. Koech*, 907 F.2d 1110, 1112 (11th Cir. 1990).

Rotax sold the engine involved in the crash to Kodiak, a Bahamian corporation with its principle place of business in Nassau, Bahamas. Kodiak, in turn, sold the engine to South Mississippi Light Aircraft ("South Mississippi"). Kodiak retained Tropix Air Limited, another Bahamian corporation, to ship the engine from the Bahamas to South Mississippi. Tropix Air Limited delivered the engine to Miami, Florida where Tropix Express, Inc., a Florida corporation, received the shipment. Tropix Express, Inc. delivered the engine to South Mississippi. South Mississippi sold the engine to the pilot, Vitollo, and delivered the engine in New Jersey.

Plaintiffs first brought suit in federal district court in New Jersey against Rotax, Kodiak and Rotech, a British Columbia Corporation with its principle place of business in British Columbia. Rotech was not involved in the sale of the engine; but Appellants alleged that Rotech provides technical services, conducts accident investigations and services warranty claims for Rotax engines in North America. While the New Jersey action was pending, Plaintiffs filed another action in federal district court in the Southern District of Florida against Rotax, Kodiak and Rotech.[1]

Defendants moved to dismiss the suit in New Jersey based on the absence of personal jurisdiction. By order dated 24 April 2003, the motion to dismiss was granted. Instead of appealing the dismissal order, Plaintiffs moved to reopen the New Jersey action and to have the action

[1] Two other Bahamian corporations and a Bahamian resident were also named, but these defendants were dismissed for failure to attempt to serve. Plaintiffs do not appeal that ruling.

transferred to the Southern District of Florida.[3] That motion was granted and the action was transferred. The district court for the Southern District of Florida consolidated the transferred action with the other action earlier filed by Plaintiffs.

Defendants again moved to dismiss for lack of personal jurisdiction. The district court granted that motion concluding that the exercise of jurisdiction would not comport with traditional notions of fair play and substantial justice. The district court assumed, without deciding, satisfaction of the requirements of Florida's long-arm statute and minimum contacts under the Due Process clause.

A United States district court has personal jurisdiction over a defendant in a diversity action if jurisdiction is conferred by the law of the state in which the court sits. *Meier v. Sun Int'l Hotels, Ltd.*, 288 F.3d 1264, 1269 (11th Cir. 2002). Jurisdiction can be either general jurisdiction or specific jurisdiction. If a defendant is subject to the general jurisdiction of the court, the defendant must respond in that court to any cause of action, regardless of where the cause of action arose. General jurisdiction arises from the defendant's contacts with the forum that are not directly related to the cause of action being litigated. *Id.* Specific jurisdiction is founded on a party's activities in the forum that are related to the cause of action alleged in the complaint. *Consolidated Dev. Corp. v. Sherritt, Inc.*, 216

[3] Plaintiffs also sought review of the New Jersey district court orders in this appeal. Appeal of the New Jersey district court orders (i) dismissing based on a lack of personal jurisdiction and (ii) transferring the action to the Southern District of Florida was dismissed by order dated 9 September 2004.

F.3d 1286, 1292 (11th Cir. 2000). The due process contacts requisite to establishing general personal jurisdiction are more exacting than those for specific personal jurisdiction. *Id.*; *see also Seabra v. Intern'l Specialty Imports*, 869 So.2d 732, 734 (Fla.Dist.Ct.App. 2004). No exercise of jurisdiction, be it general or specific, may offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 66 S.Ct. 154, 158 (1945) (internal quotation and citation omitted).

Plaintiffs argue that two provisions of Florida law support jurisdiction over Defendants. First, Plaintiffs maintain that Rotax, Kodiak and Rotech are "engaged in substantial and not isolated activity" within Florida and, therefore, Fla. Stat. § 48.193(2) confers general jurisdiction in Florida courts.[3] Second, Plaintiffs contend that the cause of action arose from "[o]perating, conducting, engaging in, or carrying on a business or business venture" in Florida and, therefore, Fla. Stat. § 48.193(1)(a) subjects Rotax, Kodiak and Rotech to the specific jurisdiction of Florida courts.[4]

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[3] Fla.Stat. § 48.193(2) provides:

A defendant who is engaged in substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise, is subject to the jurisdiction of the courts of this state, whether or not the claim arises from that activity.

[4] Fla. Stat. 48.193(1)(a) provides:

(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself . . . to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:

(Continued on following page)

The contention that specific jurisdiction is conferred under § 48.193(1)(a) requires only brief comment. The crash that caused the injuries to Dr. Koziol occurred in New Jersey. The engine claimed to have caused the crash was manufactured in Austria. The district court found the only contact between the engine and Florida was that it passed through Florida on its way to Mississippi and eventually to New Jersey. No evidence exists that any cause of action arose as a consequence of acts of Defendants that Plaintiffs seek to characterize as "operating, conducting, engaging in, or carrying on a business" in Florida. To establish specific jurisdiction under Florida's long-arm statute more connexity between the cause of action and the foreign corporation's acts must be alleged. *See Seabra*, 869 So.2d at 734.[5]

Plaintiffs also argue that general jurisdiction applies under Florida's long-statute. None of these entities actually maintained a place of business in Florida. But Appellants contend that Lockwood of Sebring, a distributor of Rotax engines in Florida (who is not a named defendant)

(a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.

[5] Plaintiffs' reliance on *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534 (11th Cir. 1993) is misplaced. *Vermeulen* involved a company that was wholly owned by a foreign state. Jurisdiction was based on 28 U.S.C. § 1330(a), a subject matter jurisdiction provision relating to the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-11. The United States is the relevant forum for due process analysis under the Foreign Sovereign Immunities Act. *Id.* at 1553. The cause of action in *Vermeulen* – an accident occurring in the United States allegedly caused by defective design and manufacture of the car – arose from the contacts which supported specific jurisdiction in the United States. In contrast, the contacts through which Plaintiffs seek to hold Defendants amenable to suit in Florida are unrelated to their products liability claim.

"is the face of Rotax, Kodiak, and Rotech in Florida."[6] Plaintiffs cite *Meier*, 288 F.3d at 1276, and *Universal Caribbean Establishment v. Bard*, 543 So.2d 447, 448 (Fla.Dist.Ct.App. 1989), in support of their claim that Defendants are deemed to be doing business in Florida for purposes of Fla.Stat. § 48.193(2). But those cases involve suits against a corporation that had an affiliated corporation conducting business in Florida. As we stated in Meier:

> The court may extend jurisdiction to any foreign corporation where the affiliated domestic corporation manifests no separate corporate interests of its own and functions solely to achieve the purpose of the dominant corporation.

288 F.3d at 1273 (internal quotation and citation omitted). Even in cases involving a parent and its subsidiary, courts are reluctant to impute the activities of the subsidiary to the parent when some semblance of independence has been maintained. *See Consolidated Dev. Corp.*, 216 F.3d at 1293-94. Plaintiffs cite us to no evidence that Lockwood is an affiliate of Rotax, Kodiak or Rotech, that these entities held an ownership interest in Lockwood, or that Lockwood functions solely to achieve the purposes of these corporations. Proffered evidence shows only that Lockwood is a distributor for Rotax and Kodiak. We doubt that Florida would extend the principles articulated in *Meier* and *Universal* to subject a foreign corporation to the general jurisdiction of the state under these circumstances.

But even if – as the district court assumed without deciding – the Florida long-arm statute conferred jurisdiction,

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[6] Lockwood did not purchase or handle in any way the engine that was in the aircraft in which Dr. Koziol crashed.

we agree with the district court that the exercise of jurisdiction would offend traditional notions of fair play and substantial justice.

Florida has little interest in providing a forum simply because the product passed through Florida on its way to New Jersey. The only contact the subject engine had with Florida is that a Florida corporation received shipment of the engine in Florida for delivery to a Mississippi corporation who then delivered the engine to a New Jersey purchaser. The contact of these international Defendants with Florida in terms of this engine is even more removed. That the Defendants had other unrelated (albeit still attenuated) contacts with Florida as alleged by Plaintiffs is insufficient to require them to defend in Florida against a claim that arises in another state and has no nexus to those Florida contacts. We are cited to no case where the exercise of general jurisdiction was found to comport with traditional notions of fair play and substantial justice on contacts as attenuated as the contacts of these Defendants with Florida. Again, the accident occurred in New Jersey and the injured party is a New Jersey resident. The cause of action arose out of and was related to no activity of Defendants in Florida. Cases in which specific jurisdiction was affirmed have no applicability.

On the basis of these facts and in the light of the international context, the district court committed no reversible error when it dismissed for want of personal jurisdiction over Defendants.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

THEODORE KOZIOL,

Plaintiff

v.

BOMBARDIER-ROTAX GMBH, et al.,

Defendants

Case No.: 02-61807-CIV-COHN

THEODORE KOZIOL,

Plaintiff,

v.

BOMBARDIER-ROTAX GMBH, et al.,

Defendants. /

Case No.: 03-61096-CIV-COHN

ORDER GRANTING MOTIONS TO DISMISS FOR LACK OF PERSONAL JURISDICTION

(Filed Mar. 27, 2004)

THIS CAUSE is before the Court upon Motion to Dismiss for Lack of Subject Matter Jurisdiction by Defendant Bombardier-Rotax GmbH Motorenfabrik ("Rotax") (docket entry # 4); Motion to Dismiss for Lack of Subject Matter Jurisdiction by Defendant Rotech Research Canada, Ltd. ("Rotech") (docket entry # 21); and Motion to Dismiss for Lack of Subject Matter Jurisdiction by Defendant Kodiak Research, LTD. ("Kodiak") (docket entry # 33). Plaintiffs Theodore Koziol and Lois Koziol have filed oppositions to each motion along with supporting evidence.

The Court has reviewed the entire record and finds as follows.

In determining an issue of personal jurisdiction, Plaintiff has the burden of establishing a case of personal jurisdiction over a nonresident Defendant with sufficient evidence to withstand a motion for directed verdict. *Madara v. Hall*, 916 F.2d 1510, 1514. If a Defendant submits affidavits to the contrary, the burden falls to Plaintiff to produce evidence supporting jurisdiction. *Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1215 (11th Cir. 1999). Where Plaintiff's submissions conflict with those of Defendant, all reasonable inferences are drawn in favor of Plaintiff. *Id.* at 1214.

A Federal District Court sitting in diversity may exercise personal jurisdiction to the extent authorized by the law of the state in which it sits and to the extent allowed under the Constitution. *Morris v. SSE, Inc.*, 843 F.3d 489, 492 (11th Cir. 1988). Therefore, this Court must determine that the Florida long-arm statute is satisfied and that jurisdiction comports with the due process requirements of the Fourteenth Amendment. *Posner*, 178 F.3d at 1220. Due process requires certain minimum contacts by a Defendant with the forum so that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. *International Shoe v. Washington*, 326 U.S. 310, 316 (1945).

In determining whether jurisdiction would comport with traditional notions of fair play and substantial justice, a Court considers: (a) the burden on the Defendant, (b) the forum State's interest in adjudicating the dispute; (c) the Plaintiffs interest in obtaining convenient and effective relief, (d) the interstate judicial system's

interest in obtaining the most efficient resolution of controversies, and (e) the shared interest of the several states in furthering fundamental substantive social policies. *Burger King Corp. V. Rudzewicz*, 471 U.S. 462, 476 (1985).

The burden on an alien Defendant conducting litigation in our system is to be given significant weight in the determination of the reasonableness of stretching personal jurisdiction over national borders. *Asahi Metal Industry Co.. Ltd. V. Superior Court of California*, 480 U.S. 102, 114. (1987). When the Defendant is a foreign corporation, a Court should also consider the procedural and substantive interests of the foreign state whose interests are affected by the assertion of jurisdiction by a Florida court. *Id.* at 115. Those interests, along with the Federal Government's interest in foreign relations policies, are best served with careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case and with an unwillingness to find the serious burdens on an alien Defendant outweighed by minimal interests on the part of the forum State. *Id.*

The following undisputed facts militate against the exercise of jurisdiction.[1] Plaintiffs are citizens of the State of New Jersey. On March 20, 1999, Theodore Koziol was a passenger aboard an ultralight aircraft operated by Vincent Vitollo near Lakewood, New Jersey. The aircraft crashed killing Mr. Vitollo and injuring Mr. Koziol. The

[1] As part of their response, Plaintiffs ask for additional time to conduct jurisdictional discovery. First, Plaintiffs have had ample opportunity in New Jersey and during the pendency of this case to conduct discovery. Second, additional discovery would add little if anything to the analysis in light of the Court's narrow ruling.

aircraft was powered by an engine, model 582-UL, designed and manufactured by Rotax.

Rotax is an Austrian corporation with its principal place of business in Austria. It manufactures engines which are used for, among other things, small aircraft in Austria. Some of these engines are shipped to Kodiak in the Bahamas. Kodiak is a Bahamian corporation with its principal place of business in the Bahamas. Kodiak sells Rotax engines FOB Nassau Bahamas to wholesalers and original equipment manufacturers in the United States, Central America and South America. The retailers for Rotax engines in the United States are located in (1) Mississippi, (2) California, (3) Wisconsin; and (4) Florida.

Kodiak hired Tropix Air Limited ("Tropix Air"), a Bahamian corporation to deliver the engines to the United States. Tropix Air imports the Rotax engines into the United States through South Florida. Lockwood Aviation Supply ("Lockwood") is a Florida corporation and a distributor of Rotax engines. Although the parties spend substantial time discussing the relationship between Defendants and Lockwood, it is undisputed that the engine involved in this litigation passed through Florida to South Mississippi Light Aircraft ("South Mississippi"). South Mississippi sold and delivered the engine to Mr. Vitollo.

Rotech is a British Columbia corporation with its principal place of business in Vernon, British Columbia, Canada. Rotech provides technical services, conducts

accident investigations in North America and services warranty claims for engine owners.[2]

Considering the factors set forth in *Asahi Metal*, the State of Florida simply does not have a sufficient interest in the adjudication of the dispute to warrant exercising jurisdiction across national borders.[3] None of the witnesses are in Florida, the accident occurred in New Jersey and the distributor of the engine is located in Mississippi. The engine in question simply passed through the state of Florida. As such, the forum's interest in the suit is minimal when balanced against the burden on the foreign Defendants and the interests of the foreign states. An exercise of jurisdiction would not comport with traditional notions of fair play and substantial justice under these circumstances.

In light of the international context, the heavy burden on the alien Defendants and the slight interests of the State of Florida, the exercise of personal jurisdiction by a Florida court over Defendants would be unreasonable and unfair.[4] Accordingly, it is

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[2] Although Plaintiffs name Aero Distribution Limited, Aero Distribution International Limited and Pascal Ronveaux as defendants, there is nothing in the record which reveals any attempts at service. As such, the Court concludes that Plaintiffs have abandoned there claims against these Defendants. Further, Kodiak, in its motion to dismiss, represents that Aero Distribution Limited is Kodiak's former name and Aero Distribution International Limited does not exist.

[3] As the Court reaches a determination that an exercise of jurisdiction would be unreasonable and unfair, it assumes without deciding the satisfaction of the requirements of the Florida Long Arm Statute, F.S. 48.193 and minimum contacts under the Due Process clause.

[4] As part of their response, Plaintiffs request that if the Court were inclined to dismiss the action, the case should be transferred instead.

(Continued on following page)

ORDERED AND ADJUDGED as follows:

1. The Motion to Dismiss for Lack of Subject Matter Jurisdiction by Defendant Bombardier-Rotax GmbH Motorenfabrik ("Rotax") (docket entry # 4) is hereby **GRANTED**.

2. The Motion to Dismiss for Lack of Subject Matter Jurisdiction by Defendant Rotech Research Canada, Ltd. ("Rotech") (docket entry # 21) is hereby **GRANTED**.

3. The Motion to Dismiss for Lack of Subject Matter Jurisdiction by Defendant Kodiak Research, LTD. ("Kodiak") (docket entry # 33) is hereby **GRANTED**.

4. The Clerk of Court is directed to close this case. All pending motions are hereby **DENIED** as moot.

DONE AND ORDERED this 22nd day of March, 2004.

/s/ James I. Cohn
JAMES I. COHN
UNITED STATES
DISTRICT JUDGE

Copies Furnished:
Robert Adam Trilling
Arthur Alan Wolk
Christopher J. Cerski
Scott M. Sarason
Connis O. Brown III

However, Plaintiffs give no indication as to where transfer would be appropriate.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-12041-DD

THEODORE KOZIOL,
LOIS KOZIOL,

02-CV-1807

Plaintiffs-Appellants,

versus

BOMBADIER-ROTAX GMBH, Motorenfabrik, individually and as a Joint Venturer with Kodiak Research Ltd., Rotech Research Canada, Ltd., a.k.a. Kodiak Research Canada, Ltd., a.k.a. Aero Distribution Limited, et al.,

ROTECH RESEARCH CANADA, LTD., individually and as a joint venturer with Bombadier-Rotax GmbH, Kodiak Research Ltd., Aero Distribution International Limited and Pascal Ronveaux, et al.,

Defendants-Appellees.

THEODORE KOZIOL,
LOIS KOZIOL,

03-CV-61096

Plaintiffs-Appellants,

versus

BOMBADIER-ROTAX GMBH,
MOTORENFABRIK, KODIAK
RESEARCH CANADA, LTD.,
et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(Filed Sep. 9, 2004)

Before MARCUS and PRYOR, Circuit Judges.

BY THE COURT:

This appeal MAY PROCEED as to the district court's March 22, 2004, order granting the defendants' motions to dismiss. 28 U.S.C. § 1291; *Pitney Bowes, Inc. v. Mestre*, 701 F.2d 1365, 1368 (11th Cir. 1983).

However, appellee Bombadier-Rotax GMBH Motorenfabrik's motion for partial dismissal of the appeal as to the District of New Jersey district court orders issued on April 24, 2003, and May 22, 2003, is GRANTED. We lack appellate jurisdiction to review the decision of a district court in another circuit. *In re Corrugated Container Anti-Trust Litigation*, 620 F.2d 1086, 1090-91 (5th Cir. 1980); *Roofing and Sheet Metal Services, Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 985-86 (11th Cir. 1982). The appeal is DISMISSED as to those two orders.

APPENDIX D

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

THEODORE KOZIOL and LOIS KOZIOL, Plaintiffs, v. BOMBARDIER-ROTAX GmbH, BOMBARDIER INC., KODIAK RESEARCH LTD., and ROTECH RESEARCH CANADA LTD. a/k/a KODIAK RESEARCH CANADA, LTD., Defendants.	CIVIL ACTION NO. 00-1938 (GEB)

ORDER MODIFYING THE ORDER OF APRIL 24, 2003

(Filed May 22, 2003)

This matter having been brought before the Court by Wolk & Genter and Edwards & Caldwell attorney for plaintiffs Theodore Koziol and Lois Koziol, pursuant to Fed.R.Civ.P. 59(e) and, alternatively pursuant to Fed.R.Civ.P. 60(b), and on notice to Robert J. Kelly of Wilson Elswer Moskowitz Edelman & Dicker LLP, counsel for defendant Bombardier-Rotax GmbH Motorenfabrik, and to Robert M. Goodman of Carpenter, Bennett & Morrisey, counsel for defendants Kodiak Research Ltd., and Rotech Research Canada, Ltd., for an order modifying the order of April 24, 2003, which dismissed the plaintiffs' complaint for lack of personal jurisdiction in the District of New Jersey, by transferring the plaintiffs' complaint to the District Court for the Southern District of Florida, and

The Court, having determined that the transfer of the complaint to the District Court for the Southern District of Florida is warranted as long as it is conditioned on the payment by the plaintiffs of the legal fees incurred by the defendants after April 24, 2003, in opposing the motion to modify the order of April 24, 2003, and

Counsel for the plaintiffs, having accepted the payment of the legal fees incurred by the defendants after April 24, 2003, as a condition for the transfer of the plaintiffs' complaint to the District Court for the Southern District of Florida.

It is on this 22nd day of May, 2003,

ORDERED AS FOLLOWS:

1. The order of April 24, 2003, is hereby modified to permit the transfer of this action to the District Court for the Southern District of Florida;

2. The Clerk of the District Court for the District of New Jersey is hereby directed to take all necessary steps to transfer the complaint, Koziol et al. v. Bombardier-Rotax, GmbH Motorenfabrik et al., Civil Action No. 00-1938 (GEB), to the District court for the Southern District of Florida and to advise Clarence Maddox, the Clerk of the District Court for the Southern District of Florida, that a similar complaint captioned Koziol v. Bombardier-Rotax, GmbH Motorenfabrik et al., Civil Action No. 02-61807 CIV-ROETTGER, is on file in the Clerk's Office and is assigned to the Fort Lauderdale Division of the Southern District of Florida;

3. Counsel for the defendants shall serve an affidavit of services on counsel for plaintiffs within 10 days of the date of the entry of this order listing all legal fees and expenses incurred after April 24, 2003, as a result of the plaintiffs' motion to modify the order of April 24, 2003;

4. The District Court for the District of New Jersey shall maintain jurisdiction of this matter solely for the purpose of resolving any disputes related to the enforcement of the terms of this order.

/s/ Garrett E. Brown, Jr.
Garrett E. Brown, Jr.,
U.S.D.J.

APPENDIX E

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

THEODORE KOZIOL and LOIS KOZIOL, Plaintiffs, v. BOMBARDIER-ROTAX GmbH MOTORENFABRIK; BOMBARDIER, INC., KODIAK RESEARCH LTD., and ROTECH RESEARCH CANADA LTD. a/k/a KODIAK RESEARCH CANADA, LTD. Defendants.	Civ. No. 00-1938 (GEB) **MEMORANDUM OPINION**

(Filed Apr. 24, 2003)

BROWN, District Judge

This matter comes before the Court upon the motions to dismiss by defendants, Bombardier-Rotax GmbH Motorenfabrik; Bombardier Inc. ("Rotax"), Kodiak Research Ltd. ("Kodiak"), and Rotech Research Canada Ltd. a/k/a Kodiak Research Canada, Ltd. ("Rotech"), on plaintiffs' complaint. The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(a). However, defendants assert that this Court does not have personal

jurisdiction over them.[1] For the reasons discussed below, defendants' motions to dismiss are granted.

I. BACKGROUND

On March 20, 1999, plaintiff, Theodore Koziol, was a passenger in an ultralight aircraft that crashed, leaving him seriously injured and killing the pilot, Vincent Vitollo ("Vitollo"). Plaintiffs' Brief at 1. The plane was powered by a Bombardier-Rotax 582-IIL engine. *Id.* Plaintiffs allege that the engine seized during the flight causing the crash. *Id.* On April 24, 2000, plaintiffs filed a complaint in this Court. *Id.* at 2. Plaintiffs named defendants asserting that they are liable for introducing, manufacturing, supporting, designing, and distributing the defective engine.[2] *Id.* Defendants then filed motions to dismiss for lack of personal jurisdiction. *Id.* This Court eventually ordered jurisdictional discovery, which ended on December 23, 2002. *Id.* On January 17, 2003, defendants reopened their motions to dismiss for lack of personal jurisdiction. *Id.*

Rotax is an Austrian corporation with its principal place of business in Gunskirchen, Austria. Rotax's Brief at 2. Kodiak is a Bahamian corporation with its principal place of business in the Bahamas. Kodiak's Brief at 2. Rotech is a British Columbia corporation organized under the laws of the Province of British Columbia, with its principal place of business in Vernon, British Columbia, Canada. Rotech's Brief at 2. Rotax Manufactures engines

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[1] Rotech also moves in the alternative, arguing that if the Court does find that personal jurisdiction exists over it, then it is entitled to summary judgment.

[2] Plaintiffs did not name Vitollo or his estate in the lawsuit.

which are used for, among other things, small aircraft. Rotax's Brief at 2. Rotax then sells and ships its uncertified aircraft engines to Kodiak.[3] *Id.*; Plaintiffs' Brief at 10. Prior to July 2001, no written agreement existed between Rotax and Kodiak. Rotax's Reply at 4. Based on their informal agreement, Kodiak would buy and resell these engines FOB, Nassau, Bahamas to wholesalers and original equipment manufacturers located in North America and South America.[4] *Id.* Rotax designed and manufactured the challenged Rotax 582-UL engine bearing Serial No. 516734 and shipped it to Kodiak. Rotax's Brief at 3. Kodiak sold this engine, FOB Nassau, Bahamas to South Mississippi Light Aircraft ("South Mississippi"), a Mississippi company. Kodiak's Brief at 2. South Mississippi sold and delivered the engine to Vitollo, of the State of New Jersey. Plaintiffs' Brief at 8. Rotech distributes Rotax certified ultralight aircraft engines in the United States. Rotax's Reply at 13. Rotech did not design, manufacture, sell or distribute the engine in the aircraft in which plaintiff, Theodore Koziol, was a passenger. Rotech's Brief at 4. However, Rotech has an agreement with Kodiak regarding the Rotax aircraft engines that Kodiak distributes to provide technical services and conduct accident

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[3] The subject of this lawsuit is an uncertified aircraft engine distributed by Kodiak.

[4] On or about July 24, 2001, Rotax and Kodiak entered into a written agreement, Bombardier-Rotax GmbH International Aircraft Engine Distributor Agreement, establishing Kodiak as Rotax's non-exclusive distributor of its uncertified aircraft engines in North America, Central America and South America. Certification of Arthur Alan Wolk ("Wolk Cert."), Exhibit B. This Court has filed Exhibit B under seal.

investigations in North America, and service warranty claims for the engine owners.[5] Plaintiffs' Brief at 4-5.

Defendants all argue that they do not have contacts with New Jersey such that the Court can exercise personal jurisdiction over them. The motions are fully briefed and are before the Court for its determination.

II. DISCUSSION

PERSONAL JURISDICTION STANDARD

Rule 4(e) empowers the Court to exercise personal jurisdiction over a non-resident defendant to the extent authorized by the law of the State in which that court sits. Fed. R. Civ. P. 4(c); *North Penn Gas Co. v. Corning Natural Gas Corp.*, 897 F.2d 687, 689 (3d Cir. 1990), *cert. denied*, 498 U.S. 847 (1990); *Romero v. Aerolineas Argentines*, 834 F. Supp. 673, 678 (D.N.J. 1993). New Jersey's long-arm statute permits the exercise of *in personam* jurisdiction as far as is constitutionally permissible under the Due Process Clause of the Fourteenth Amendment. N.J. Ct. R. 4:4-4; *Carteret Savings Bank, FA v. Shushan*, 954 F.2d 141, 145 (3d Cir. 1992), *cert. denied*, 506 U.S. 817 (1992); *Romero*, 834 F. Supp. at 678. Therefore, the question whether the Court has jurisdiction over defendants here is determined according to federal constitutional law. *Decker v. Circus Circus Hotel*, 49 F. Supp.2d 743, 745 (D.N.J. 1999) (citing *Mesalic v. Fiberfloat Corp.*, 897 F.2d 696, 698 (3d Cir. 1990)).

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[5] Prior to the filing of plaintiffs' complaint, there was no written agreement between Kodiak and Rotech, only an informal agreement.

"The Due Process Clause of the Fourteenth Amendment limits the power of a state court to exert personal jurisdiction over a nonresident defendant." *Asahi Metal Indus. Co., Ltd v. Superior Court of California,* 480 U.S. 102, 108 (1987). The Court may exercise jurisdiction over the nonresident defendants only where the defendants have sufficient minimum contacts with New Jersey such that the exercise of jurisdiction would not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945). Under the Fourteenth Amendment, the Court can exercise personal jurisdiction over an out-of-state defendant where "the defendant purposely avails itself of the privilege of conducting activities within the forum State thus invoking the benefits and protections of its law." *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475 (1985) (quoting *Hanson v. Denckla,* 357 U.S. 235, 253 (1958)). The contacts must be of a texture and quality such that the defendants would reasonably anticipate being haled into Court in New Jersey. *Burger King,* 471 U.S. at 474 (quoting *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 295 (1980)). However, the unilateral activities of the in-state plaintiff initiating contact with the out-of-state defendant will not satisfy the requirement of contact with the forum State. *Id.* at 474-75 (quoting *Hanson,* 357 U.S. at 253). Rather, plaintiffs must demonstrate that defendants somehow purposely directed their commercial activities into the State and thereby availed themselves of protections of the State's laws. *Id.* at 476 (quoting *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 774-75 (1984)).

The Supreme Court has delineated two categories of *in personam* jurisdiction under which a court may exercise jurisdiction over an absent defendant. *Mesalic,* 897 F.2d at

699 (citation omitted). The Court has specific jurisdiction over an absent defendant where the defendant purposely directs its activities at residents of the forum State, and the litigation results from alleged injuries arising from those specific in-state activities. *Burger King*, 471 U.S. at 472 (citing *Helicopteros Nationales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)). Additionally, the Court has general jurisdiction over an out-of-state defendant when the litigation does not arise out of the defendant's specific contacts with the forum but the defendant has been carrying on "continuous and systematic" activities in the forum such that the defendant can reasonably anticipate being haled into court in the forum. *Helicopteros*, 466 U.S. at 415.

Once the jurisdictional defense is raised, plaintiffs bear the burden of proving that defendants' contacts with New Jersey are sufficient to give the Court personal jurisdiction over defendants. *Mesalic*, 897 F.2d at 699; *Miller v. McMann*, 89 F. Supp.2d 564, 566 (D.N.J. 2000) (citation omitted). "[T]he plaintiffs must show with reasonable particularity, the nature and extent of the defendant's contacts with the forum State so as to permit this Court to exercise its *in personam* jurisdiction over the defendant[s]." *Decker*, 49 F. Supp.2d at 749 (citation omitted).

B. Defendants' Motion To Dismiss

1. Rotax, Kodiak, Rotech-Specific Jurisdiction

Rotax argues that the Court does not have specific jurisdiction over it because it did nothing more to purposefully avail itself of the benefits of doing business in the forum State of New Jersey other than to place the subject

engine into the stream of commerce. Rotax's Brief at 10-11, 13. Kodiak also maintains that it has no contacts with New Jersey other than placing the subject engine into the stream of commerce. Kodiak's Brief at 6. Rotech asserts that it has no contacts with New Jersey and that there is no evidence of its forum related activities relating to plaintiffs' claims. Rotech's Brief at 5. Plaintiffs contend that the Court has specific jurisdiction over defendants under the stream of commerce theory. Plaintiffs' Brief at 7. Plaintiffs assert that because Rotax produced the engine in Austria and sold the engine to Kodiak in the Bahamas pursuant to its distribution chain who then delivered the engine to South Mississippi in Mississippi, who subsequently sold and delivered the engine to Vitollo in New Jersey, then defendants placed the product into New Jersey's stream of commerce. *Id.* at 8. Furthermore, plaintiffs maintain that upon delivery of the Rotax engine to Vitollo he received an express warranty from Rotax, which gives both Kodiak and Rotech a contractual responsibility to offer assistance and technical support to engine owners. *Id.* Therefore, plaintiffs argue that because Rotax and Kodiak placed the engine into New Jersey's stream of commerce and the injury arose out of a breach of Rotax's express warranty because the product was defective and Kodiak and Rotech were negligent in providing product support, then this Court should maintain personal jurisdiction over defendants. *Id.*

Under the stream of commerce theory, "a forum state may exercise personal jurisdiction over a nonresident defendant that delivered its goods, albeit indirectly, into the state and either derived a substantial benefit or had a reasonable expectation of deriving such a benefit," *A. V. Imports, Inc. v. Col De Fratta, S.p.A., et al.*, 171 F.Supp.2d

369, 372 (D.N.J. 2001) (citing *Pennzoil Prods. Co. v. Colelli & Assocs., Inc.*, 149 F.3d 197, 203 (3d Cir. 1998)). Based on the stream of commerce theory, "a manufacturer may be held amenable to process in a forum in which its products are sold, even if the products were sold indirectly through importers or distributors with independent sales and marketing schemes." *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 285 (3d Cir. 1981), *cert. denied*, 454 U.S. 1085 (1981). The stream of commerce theory is a separate basis for establishing the minimum contacts standard. *World-Wide Volkswagen*, 444 U.S. at 297. The State of New Jersey has adopted the stream of commerce theory to establish personal jurisdiction over a foreign manufacturer or distributor. *Charles Gender & Co. v. Telecom Equip. Corp.*, 102 N.J. 460, 477 (1986).

However, in 1987, the theory of stream of commerce was examined by the United States Supreme Court in *Asahi Metal Indus. Co., Ltd. v. Superior Court of California*, 480 U.S. 102, 108 (1987). There, Justice O'Connor stated, in a plurality opinion, that "the 'substantial connection,' [citations omitted] between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State.*" *Id.* at 112 (citing *Burger King*, 471 U.S. at 476) (citations omitted) (emphasis in original). The Court then explained that "the placement of a product into the stream of commerce, without more, is not the act of the defendant purposefully directed toward the forum State." *Id.* Furthermore, the Court found that,

> [a]dditional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the

> product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream an act purposefully directed toward the forum State.

Id.[6]

Based on *Asahi*, the defendants here must have purposefully availed themselves of the forum State of New

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[6] There are two other standards based on the stream of commerce theory found *in Asahi*. In a concurring opinion, Justice Brennan opined that additional conduct in the forum State did not have to be shown, explaining that the awareness that the final product is being marketed in the forum State is sufficient. *Asahi*, 480 U.S. at 117. However, Justice Brennan determined that jurisdiction was not appropriate over Asahi because it would not comport with "fair play and substantial justice." *Id.* at 116. Justice Stevens also wrote a concurring opinion concluding that additional conduct with the forum State was not necessary to the Court's determination. *Id.* at 121. Rather, Justice Stevens held that jurisdiction over Asahi cannot be exercised because it would be "unreasonable and unfair." *Id.* at 122. There is no mention of *Asahi* in plaintiffs' opposition papers, however plaintiffs did assert that defendants engaged in additional conduct with the forum State of New Jersey beyond placing the product into the stream of commerce. Plaintiffs' Brief at 9-16. In addition, at oral argument, plaintiffs maintained that defendants all engaged in additional conduct with the forum State of New Jersey such that personal jurisdiction over them is proper. The Third Circuit Court of Appeals has yet to adopt one particular standard from *Asahi*. *Pennzoil*, 149 F.3d at 210, n. 13. Because plaintiffs have argued that additional conduct in the forum State was present, this Court will analyze the instant case under Justice O'Conner's approach.

Jersey in order for the Court to exercise personal jurisdiction over them.[7] Plaintiffs argue that Rotax and Kodiak have purposefully entered the New Jersey stream of commerce through their written distribution agreement. Plaintiffs' Brief at 8. Defendants assert that the written distribution agreement was entered into after the filing of plaintiffs' complaint and thus is irrelevant in this determination. Rotax's Reply at 3; Kodiak's Reply at 4. However, there was an informal agreement establishing this distribution process prior to the written agreement. Rotax's Reply at 3-4. Pursuant to this distribution process, Rotax, as manufacturer, sold its engines to Kodiak who then distributed them to dealers located in North America and South America. Rotax's Reply at 3. There is no evidence of any dealers in the United States located in New Jersey. Kodiak's Reply at 4; Rotax's Reply at 5. However, even assuming that Rotax and Kodiak were aware that the engines were eventually being shipped into and sold in New Jersey, as noted above, the mere knowledge that the stream of commerce may or will sweep its product into the forum State is insufficient to establish minimum contacts. *Asahi*, 480 U.S. at 112.

The question now is whether defendants engaged in some additional conduct in the forum State of New Jersey beyond placing the engine into the stream of commerce.

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[7] At this point, the Court notes that plaintiffs do not appear to allege, and this Court does not find, that Rotech was a part of the process of manufacturing or distributing the subject engine into the stream of commerce. Plaintiffs' Brief at 8. As such, personal jurisdiction over Rotech through the stream of commerce theory is unavailing. However, this Court will continue to analyze its contacts with New Jersey in an attempt to discern if personal jurisdiction is available over this defendant.

This Court concludes that defendants have not engaged in additional conduct to submit them to jurisdiction before this Court. Applying the additional conduct listed in *Asahi*, the result is that personal jurisdiction over defendants is not proper. First, it is undisputed that none of the defendants have designed the product for the market in the forum State of New Jersey. Second, as to advertising in the forum State, plaintiffs argue that two of Kodiak's dealers, South Mississippi and Lockwood Aviation Supply, advertised Rotax engines in the United States publication, Ultra Flyer, approximately 181 times since 1995, which were distributed to approximately 187 New Jersey residents. Plaintiffs' Brief at 13, 19. However, advertisements of Rotax's product by Kodiak's authorized dealers in a national magazine that a handful of New Jersey residents subscribe to does not amount to additional conduct directed to the forum State of New Jersey. Plaintiffs also contend that Rotax advertisements were featured approximately eight times since 1993 in another United States publication, Trade-A-Plane, of which approximately 2,500 New Jersey residents receive the magazine. *Id.* at 19. Again, eight advertisements since 1993, in a national publication, are not purposeful advertisements directed to the forum State of New Jersey.

Third, defendants have not "establish[ed] channels for providing regular advice to customers in the forum State." Plaintiffs argue that the engine purchased by Vitollo from South Mississippi was accompanied by an express warranty from Rotax of which Kodiak and Rotech were responsible for carrying out, and that defendants failed to provide the proper service to Vitollo. Plaintiffs' Brief at 8. First, because plaintiffs do not appear to allege, and this Court has not found, that Rotech was a part of placing the

questioned engine into the stream of commerce, then the stream of commerce and additional conduct from *Ahasi* do not apply to Rotech itself. However, specific jurisdiction can still be accomplished over Rotech through one contact with New Jersey and the injury arising out of it. *Burger King*, 471 U.S. at 472. Here, Rotech did not have any contacts with New Jersey relating to plaintiffs' injury. The injury arose out of the alleged defective engine of which plaintiffs contend that Rotech was negligent in not informing them of the defective nature of the product. This does not establish a Rotech contact with New Jersey, if anything it establishes that Rotech failed to have a contact with New Jersey. Therefore, specific jurisdiction over Rotech is not possible. However, the Court will now analyze Rotech's actions on behalf of Kodiak and Rotax in attempting to prove additional contacts under the stream of commerce theory. Regarding the warranty, this Court finds that it does not provide a channel for regular advice to customers in New Jersey. Warranty issues are not handled in New Jersey, rather they are serviced by Rotech in Canada. Deposition of Pascal Ronveaux ("Ronveaux Dep.") at 22-23. There is no support service system in New Jersey. In fact, as plaintiffs acknowledged, the engines are taken to the authorized distributor to be overhauled, not in New Jersey, and then sent to Rotax in Austria. Plaintiffs' Brief at 23.

In addition, plaintiffs assert that because of Rotech's agreement with Kodiak to provide product support and service bulletins regarding the defective nature of the Rotax engine, then this establishes contacts by all defendants with New Jersey. *Id.* at 8. Plaintiffs also contend that because Rotech sent an accident investigator to New Jersey following the accident, that this establishes additional

contacts by all defendants. Plaintiffs' Brief at 12. As to Rotech's agreement with Kodiak, who is a distributor for Rotax, this Court does not find that these are additional contacts with the forum State of New Jersey. First, as noted earlier, Rotech had no contact with Vitollo in New Jersey. In addition, Rotech provides these services throughout North America, not just to New Jersey. There was no service center in New Jersey for New Jersey customers to utilize. Furthermore, providing a service to investigate all accidents that occur throughout North America also does not establish additional contacts with New Jersey. There are no investigators located in New Jersey nor is there an exclusive New Jersey territory. On the contrary, the investigators service the entire North America. Finally, sending an investigator to the forum State after an accident has occurred does not constitute establishing a channel for providing regular advice to customers in the forum State.[8]

As to the last prong, "marketing the product through a distributor who has agreed to serve as the sales agent in the forum State," it is undisputed that Kodiak is Rotax's distributor and is located in Nassau, Bahamas. There is no evidence that there were any dealers located in New Jersey prior to their written agreement. It is also undisputed that following the written agreement, Kodiak's dealers through which they sell Rotax's engines throughout the United States are located in (1) Mississippi, (2) California; (3) Wisconsin; and (4) Florida. Ronveaux Dep. at 34-35. Therefore, there is no distributor or dealer

[8] Specific jurisdiction over Rotech also cannot be exercised for conducting the accident investigation in New Jersey. Plaintiffs' injury did not arise from Rotech's accident investigation.

located in New Jersey. Thus, plaintiffs have failed to establish specific jurisdiction over defendants.

2. Rotax, Kodiak, Rotech – General Jurisdiction

Plaintiffs argue that defendants have contacts that are continuous and systematic with the State of New Jersey that enables this Court to exercise general jurisdiction over them. Plaintiffs' Brief at 16. Defendants contend that they are not authorized; licensed or registered to do business in New Jersey, and that, in any event, they have no contacts with New Jersey that are continuous and systematic. Rotax's Brief at 7; Kodiak's Brief at 8; Rotech's Brief at 7.

The seminal case, *Helicopteros Nacionales de Colombia. S.A. v. Hall*, 466 U.S. 408, 416 (1984), governs the standard for general jurisdiction over a foreign defendant. There, the Supreme Court held that the foreign defendant's contacts with the forum State must be "continuous and systematic" for the Court to exercise general jurisdiction. *Id.* at 416. In *Helicopteros*, the Supreme Court found that the foreign defendant's contacts were not continuous and systematic in the forum State of Texas. *Id.* at 418-19. The contacts included: (1) a trip to Texas by the defendant's CEO to negotiate a contract with the victim's employer; (2) purchases of four million dollars including helicopters, parts and accessories from a Texas manufacturer; (3) sending pilots, management and maintenance personnel to Texas for training; (4) sending pilots to Texas to ferry helicopters; and (5) accepting into its New York bank account checks drawn on a Houston bank. *Id.* at 410-11. With this in mind, the Court now turns to plaintiffs'

allegations of Rotax's contacts with the forum State of New Jersey.

a. Rotax

Plaintiffs maintain that the following alleged contacts with New Jersey are continuous and systematic such that general jurisdiction over Rotax can be exercised: (1) Rotax's distribution agreement with Kodiak resulting in 1,000 engines distributed into the United States annually; (2) Rotax's advertisements; (3) Rotax's distribution process in the United States for its certified engines through Rotech, resulting in forty-three aircraft equipped with Rotax engines registered with the Federal Aviation Administration ("FAA"); (4) Rotax's distribution to New Jersey since 1989, of 2,750 engines found in snowmobiles, ATVs and See-Doos; and (5) motorcycles with Rotax engines available in New Jersey.[9] Plaintiffs' Brief at 19-20.

Applying the standard in *Helicopteros* to the facts here, this Court concludes that there are insufficient contacts with New Jersey for general jurisdiction over

[9] Plaintiffs also submitted a declaration from John Vitollo, the son of the pilot Vitollo, asserting that his father was a sub-distributor of Rotax engines, that the ultralight community knows that Rotax sells engines in New Jersey, and that based on his experience, and that of his father, Rotax does business in New Jersey. Wolk Cert., Exhibit A. However, plaintiffs have not provided any evidence to demonstrate these alleged Rotax contacts with New Jersey beyond John Vitollo's mere conclusory statements. In addition, John Vitollo made legal conclusions, which is a determination that rests entirely with this Court. Plaintiffs also rely upon the report of Joe Wisenblit, Ph.D., who concluded that Rotax "established continued and systematic contact" with New Jersey. *Id.*, Exhibit L. However, Dr. Wisenblit's report is also a legal conclusion and thus cannot be utilized by this Court in its determination.

Rotax. First, it is undisputed that Rotax does not have a place of business in New Jersey and never has been licensed to do business in New Jersey. *Helicopteros*, 466 U.S. at 416. Next, plaintiffs are incorrect in their assertion that Kodiak annually distributes 1,000 engines into the United States. The record reveals that 1,000 engines are annually shipped in and out of the Bahamas. Ronveaux Dep. at 84-85. In any event, plaintiffs have not produced any evidence of the amount of these engines entering the forum State of New Jersey. As noted earlier, the contacts with New Jersey regarding the distribution agreement with Kodiak creates the possibility that Rotax engines could be swept into New Jersey, but is not such that establishes continuous and systematic contacts with New Jersey. In addition, as mentioned before, Rotax's alleged advertising is minimal and reaches a small amount of New Jersey residents. As to Rotech's distribution of certified Rotax engines into the United States, plaintiffs have not identified that any of these Rotax certified engines were in fact distributed by Rotech into the State of New Jersey. The alleged distribution of forty-three certified engines in the United States does not establish contacts with New Jersey that are continuous and systematic.

Finally, the remaining alleged contacts with New Jersey regarding Rotax engines in snowmobiles, ATVs, See-Doos and motorcycles are simply not of the continuous and systematic nature such that Rotax should expect to be haled into a New Jersey court. *Burger King*, 471 U.S. at 474. Plaintiffs have not supplied this Court with any evidence that Rotax actually distributed these engines into the State of New Jersey. *Jones v. Perry-Ray Geophysical, Geosource, Inc.*, 954 F.2d 1061, 1068 (5th Cir. 1992), *cert. denied*, 506 U.S. 867 (1992) ("The minimum contact

inquiry is broader and more demanding when general jurisdiction is alleged, requiring a showing of substantial activities in the forum state.").

b. Kodiak

Plaintiffs assert that the following alleged contacts by Kodiak with the forum State of New Jersey are continuous and systematic: (1) Kodiak's distribution agreement with Rotax resulting in 1,000 engines distributed into the United States annually; (2) Kodiak's advertising of Rotax engines; (3) the warranty and product support it has to supply to owners of Rotax engines; and (4) a supply agreement for Rotax engines established with the New Jersey company, Paladin. Plaintiffs' Brief at 21-22. Regarding Kodiak's responsibility to the customers' warranties and product support, plaintiffs argue that Kodiak "would have" had contact with the owners of the 225 aircraft Rotax engines that the FAA reported service difficulty, including three accidents reported in New Jersey. *Id.* at 21.

This Court finds that under *Helicopteros*, plaintiffs have failed to allege contacts by Kodiak that are continuous and systematic. Initially, the Court notes that Kodiak does not have a place of business in New Jersey and is not licensed to do business in New Jersey. *Helicopteros*, 466 U.S. at 416. Next, as mentioned earlier, Kodiak's distribution agreement with Rotax does not result in continuous and systematic contacts with New Jersey. Furthermore, as noted before, the advertising does not create continuous and systematic contacts with New Jersey. Moreover, the warranty and product support supplied by Kodiak is for all engine owners it distributes to, not just New Jersey, and

requires that Rotech, in Canada, handle all the inquiries. Also, plaintiffs cannot rely on assumptions as to whether Kodiak "would have" had contacts with owners that reported engine difficulty with the FAA. Plaintiffs have not provided this Court with any evidence of any contact by Kodiak with any of these engine owners, let alone any engine owners in New Jersey. Finally, Kodiak's agreement with Paladin was entered into after plaintiffs filed their complaint and there is no evidence that an informal agreement existed between the two prior to the filing of plaintiffs' complaint. Reply Certification of Pascal Ronveaux ¶ 3. This evidence is insufficient to obtain jurisdiction over Kodiak. *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 569 (2d Cir. 1996), *cert. denied*, 519 U.S. 1006 (1996) ("contacts are commonly assessed over a period of years prior to the plaintiff's filing of the complaint."). Therefore, based on the above, plaintiffs have not proven general jurisdiction over Kodiak.

c. Rotech

Plaintiffs contend that Rotech's alleged continuous and systematic contacts with New Jersey consist of: (1) Rotech's distribution agreement with Rotax for certified engines in the United States resulting in forty-three engines in New Jersey; (2) Rotech "would have" been involved in assessing warranty claims in 225 Rotax engines that the FAA reported were defective Rotax engines, including accidents and incidents in New Jersey; and (3) Rotech's agreement with Kodiak to serve as Kodiak's accident investigator, and to provide product support and service bulletins for the Rotax engines that Kodiak distributes in North America. Plaintiffs' Brief at 22-23.

Based on *Helicopteros*, this Court holds that plaintiffs have failed to prove contacts by Rotech that are continuous and systematic. The Court first notes that Rotech also does not have a place of business or is licensed in New Jersey. *Helicopteros*, 466 U.S. at 416. As mentioned earlier, Rotech's distribution of certified Rotax engines into the United States does not establish contacts with New Jersey that are continuous and systematic. Plaintiffs again argue that Rotech "would have" been involved in assessing warranty claims and investigating accidents in New Jersey based on FAA reported defective Rotax engines, but as noted earlier, this is insufficient to establish personal jurisdiction. Finally, Rotech's accident investigations and product support were to be conducted throughout North America and not just New Jersey. The fact that Rotech investigated one accident in New Jersey does not amount to systematic and continuous contacts with the forum State. Therefore, plaintiffs have failed to prove personal jurisdiction over Rotech.[10]

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[10] Because this Court has found that defendants did not purposefully direct their actions to the forum State of New Jersey under the stream of commerce specific jurisdiction theory and did not maintain continuous and systematic contacts with the forum State of New Jersey for general jurisdiction, there is no need for the Court to address whether exercising personal jurisdiction over defendants would offend traditional notions of fair play and substantial justice. *Burger King*, 471 U.S. at 476. However, the Court notes that each defendant is a foreign corporation with their principal places of business, as well as their employees and documents, in Austria, the Bahamas, and Canada. "The unique burdens placed up an one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Asahi*, 480 U.S. at 114. In addition, this Court has serious doubts as to any burden on plaintiffs to litigate this case outside of the forum State of New Jersey because on December 30, 2002, plaintiffs filed a lawsuit against these parties seeking the same relief in

(Continued on following page)

III. CONCLUSION

For the reasons expressed herein, defendants' motions to dismiss are granted. An appropriate form of order is filed herewith.

/s/ Garrett E. Brown, Jr.
GARRETT E. BROWN, JR.,
U.S.D.J.

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the Southern District of Florida. Certification of Karen Warren, Exhibit B. Therefore, even under Justice Brennan's and Justice Steven's analysis *from Asahi*, this Court still does not have personal jurisdiction over defendants.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-12041-DD

THEODORE KOZIAL* and LOIS KOZIAL,*

Plaintiff-Appellants,

versus

BOMBARDIER-ROTAX GMBH,
MOTORENFABRIK, et al.,

Defendant-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

(Filed Aug. 17, 2005)

BEFORE: EDMONDSON, Chief Judge, BLACK and PRYOR, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by the Appellants is DENIED.

ENTERED FOR THE COURT:

/s/ J.L. Edmondson
CHIEF JUDGE

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* The correct spelling is "Koziol."

APPENDIX G

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. XIV, § 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Statutes:

28 U.S.C. § 1291:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the

Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1294:

Except as provided in sections 1292(c), 1292(d), and 1295 of this title, appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district;

(2) From the United States District Court for the District of the Canal Zone, to the Court of Appeals for the Fifth Circuit;

(3) From the District Court of the Virgin Islands, to the Court of Appeals for the Third Circuit;

(4) From the District Court of Guam, to the Court of Appeals for the Ninth Circuit.

28 U.S.C. § 1406:

(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

(b) Nothing in this chapter shall impair the jurisdiction of a district court of any matter

involving a party who does not interpose timely and sufficient objection to the venue.

(c) As used in this section, "district court" includes the United States District Court for the District of the Canal Zone; and "district" includes the territorial jurisdiction of that court.

Florida Statute:

FLA. STAT. 48.193(2):

A defendant who is engaged in substantial and not isolated activity within this State, whether such activity is wholly interstate, intrastate, or otherwise, is subject to the jurisdiction of the courts of this state, whether or not the claim arises from that activity.

APPENDIX H

BOMBARDIER – ROTAX G.m.b.H.

INTERNATIONAL AIRCRAFT ENGINE

DISTRIBUTOR AGREEMENT

AGREEMENT entered into in Gunskirchen, Austria on this 24 day of JULY, 2001.

between: BOMBARDIER – ROTAX G.m.b.H., a corporation organized under the laws of Austria and having a place of business at Welser Strasse 32, A-4623 Gunskirchen, Austria (hereinafter referred to as "MANUFACTURER").

and: KODIAK RESEARCH LTD., a corporation organized under the laws of the Bahamas and having its principal place of business at PO Box N7113, Marlborough House Cumberland Street, Nassau, BAHAMAS and duly represented by its officers (hereinafter referred to as "DISTRIBUTOR").

WHEREAS MANUFACTURER is engaged in the business of manufacturing, selling and distributing PRODUCT listed in Exhibit "A", and DISTRIBUTOR desires to purchase from MANUFACTURER and distribute said PRODUCT through independent dealers,

THEREFORE, IT IS AGREED AS FOLLOWS:

1. **DEFINITIONS**

PARTIES: means the DISTRIBUTOR and the MANUFACTURER identified in the preamble.

TERRITORY: Distributorship rights granted pursuant to this Agreement shall be for the TERRITORY comprised of the following: The United States of

America, Central America and South America (including Brazil, Chile, Argentina and Colombia).

* * *

5. **DISTRIBUTOR DUTIES**

(a) DISTRIBUTOR shall ensure that it and the dealers advertise, display, and demonstrate PRODUCT including safety features of the PRODUCT in TERRITORY, and shall encourage and assist the dealers to advertise, display, demonstrate and sell said PRODUCT to the public while employing sound and ethical business practices, at suitable locations and with adequate facilities.

(b) DISTRIBUTOR shall clearly identify its place of business as that of an authorized ROTAX Aircraft Engine DISTRIBUTOR and/or ROTAX Aircraft Engine Repair Center with suitable signs and displays. All signs, displays and other advertising materials shall be submitted before use to MANUFACTURER for approval.

(c) DISTRIBUTOR shall ensure that the dealers make the required pre-delivery set-up and inspection on PRODUCT sold by them and also make all inspections or service work, which may be recommended by MANUFACTURER from time to time, on PRODUCT being used at the time in the TERRITORY. MANUFACTURER reserves its right to request reports of such performance by DISTRIBUTOR and/or dealers.

(d) DISTRIBUTOR and dealers shall utilize sufficient and adequate facilities, tooling and adequately trained personnel in the sales and service of the PRODUCTS.

(e) DISTRIBUTOR is responsible to ensure dealers comply with the mutually approved guidelines of DISTRIBUTOR and MANUFACTURER.

* * *

(k) DISTRIBUTOR shall keep, or cause dealers to keep, separate registries for every repair or service claim made under warranty for the PRODUCTS in the TERRITORY. DISTRIBUTOR shall notify dealers to comply with local laws pertaining to the servicing of the PRODUCTS, including requirements relating to work orders or estimates, as may be applicable. DISTRIBUTOR shall grant and require the dealers to grant access to such registries to MANUFACTURER or any agent or employee MANUFACTURER may designate.

(l) DISTRIBUTOR shall keep, or cause dealers to keep, all parts replaced under warranty for a period of one year after any warranty work is claimed, so as to enable MANUFACTURER to inspect them, before credits, if applicable, are issued.

* * *

(n) The Parties recognize the importance of the safety of the PRODUCTS and those who come in contact with them, including the public. Accordingly, the DISTRIBUTOR warrants not to stock government surplus, PMA or "bogus" parts for resale and not to utilize such parts, or components thereof, in any work done on the PRODUCTS. Moreover, DISTRIBUTOR warrants to only stock approved replacement parts and accessories sourced from or approved in writing by the MANUFACTURER for use on the PRODUCTS. For certified PRODUCTS these parts will also have to be approved by competent Government authorities.

* * *

(q) MANUFACTURER agrees to indemnify, protect, and save harmless DISTRIBUTOR against any liability, losses, damages or expenses (including reasonable attorney fees) resulting from the failure of MANUFACTURER to comply with its obligations under this

Agreement or at Law in the manufacturing of the PRODUCTS.

* * *

(s) DISTRIBUTOR undertakes to subscribe and keep in force insurance coverage with minimum limits and coverages as follows:

(i) aviation PRODUCTS liability insurance, the limit of liability of such insurance shall not be less the Three Million U.S. Dollars ($3,000,000.00) per occurrence;

* * *

6. **WARRANTY**

(a) MANUFACTURER makes no representations or warranties, expressed or implied, with respect to the PRODUCT, except as provided in the written warranty issued, from time to time, in accordance with its business judgment. DISTRIBUTOR shall offer for sale to the dealers and shall ensure that the dealers offer for sale to their customers, PRODUCT at least on the basis of MANUFACTURER's written warranty.

* * *

(d) DISTRIBUTOR shall supervise that the dealers honor MANUFACTURER's limited warranty and perform, at no cost to the customer, any authorized repairs under such warranty on covered PRODUCT being used at the time in the dealer's TERRITORY promptly and efficiently. DISTRIBUTOR further undertakes to do, or cause to be made, any verification, certification, replacement, maintenance and repairs MANUFACTURER may require to be done on any Product, unless MANUFACTURER indicates otherwise.

(e) In consideration of reasonable warranty service work that may be required on the PRODUCT, excluding recall campaign due to serial defects, DISTRIBUTOR agrees to be fully responsible for all warranty work and, MANUFACTURER hereby agrees to compensate DISTRIBUTOR for such reasonable warranty work as provided in Exhibit "D".

(f) DISTRIBUTOR shall be fully responsible to ensure that the dealers or service network is adequately compensated for any warranty or service campaigns performed on PRODUCT during the warranty coverage period. MANUFACTURER reserves its right to examine any warranty claim paid by the DISTRIBUTOR.

(g) Within twelve (12) months from signature of this Agreement, DISTRIBUTOR shall ensure that MANUFACTURER promptly receive the warranty information, including the retail or end user's name, coordinates and the related Product's serial number, according to MANUFACTURER's procedures.

7. **AFTER SALE SERVICE SUPPORT**

* * *

(b) DISTRIBUTOR shall maintain and require the dealers to maintain a properly equipped Service Department, including adequate inventory of spare parts, capable of adequately servicing PRODUCT with MANUFACTURER's recommended equipment and special tools. Both the DISTRIBUTOR and the dealers shall respectively assume sole responsibility for the workmanship of any maintenance or repair work performed by them, or their respective employees, and shall not hold the MANUFACTURER responsible in any way if any failure or damage is caused to the PRODUCT as a direct result of their acts or omissions including but not limited to, DISTRIBUTOR or

dealer failure to perform service management or warranty management or repairs as required.

8. **COMMUNICATION WITH CUSTOMERS**

(a) MANUFACTURER expressly reserves the right to communicate directly with purchasers of PRODUCT to obtain any information regarding such PRODUCT or the service provided with respect thereto.

* * *

9. **TRADEMARKS**

* * *

(b) DISTRIBUTOR further acknowledges and shall ensure that the dealers acknowledge that DISTRIBUTOR's and the dealer's right to use the trademarks listed, is strictly limited to such use as is contemplated by this Agreement and insures to the benefit of MANUFACTURER and not of DISTRIBUTOR or such dealers.

* * *

(d) DISTRIBUTOR and the dealers may use in its firm name, on signs, displays and other advertising or promotional material, the name or any other trademark or trade name of MANUFACTURER only in accordance with specific written permission from MANUFACTURER, which permission may be revoked at any time with cause or withheld at MANUFACTURER's discretion.

* * *

EXHIBIT "A"
PRODUCT

Rotax 447 UL SCDI Mod. 90.
Rotax 503 UL DCDI Mod. 90.
Rotax 582 UL DCDI Mod. 99.
Rotax 912 UL DCDI Mod. 94#81HP
Rotax 912 A (series 1, 2, 3 and 4) Mod. 95 JAR-22 certification.
Rotax 912 F (series 2, 3 and 4) Mod. 96 FAR-33 certification.
Rotax 912 ULS DCDI (series 2, 3 and 4) Mod. 99.
Rotax 912 S (series 2, 3, and 4) Mod. 99 FAR-33 certification.
Rotax 914 UL DCDI (series 2, 3 and 4) Mod. 94.
Rotax 914 F (series 2,3 and 4) Mod. 97 JAR-E/FAR-33 certification.

and any derivatives thereof, including any fuel injected models if any, if released during the Term by MANUFACTURER for sale in the Territory.

(hereinafter referred to as "PRODUCT").

EXHIBIT "D"
ADMINISTRATION OF WARRANTY

1. DISTRIBUTOR recognizes and agrees to be fully responsible for all warranty work to be performed by an authorized dealer on the PRODUCTS in the TERRITORY.

2. Moreover, DISTRIBUTOR undertakes to assume all and any obligation, either commercial or financial, imposed by or resulting from the application, in any given country, of any mandatory national laws, which may vary from country to country.

3. MANUFACTURER shall compensate DISTRIBUTOR for reasonable warranty service work, at the established labor rate and labor flat rate time and parts, done by an authorized dealer as required under the applicable Rotax aircraft engine INTERNATIONAL LIMITED WARRANTY for the PRODUCTS.

4. MANUFACTURER reserves its rights to validate any warranty work performed and to verify any warranty claim submitted by an authorized dealer to a DISTRIBUTOR.

5. It is understood that administration of warranty process will be subject to review and change therein from time to time by MANUFACTURER in the normal course of business.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

TRENTON DIVISION

THEODORE KOZIOL and LOIS KOZIOL,	:	CIVIL ACTION
Plaintiffs,	:	
vs.	:	
BOMBARDIER-ROTAX GmbH, [et al.]	:	
Defendants	:	NO. 00-1938

Friday, December 13, 2002

Videotape examination of JOSEF FURLINGER, held at the offices of Avitat Sky Service, 9785 Ryan Avenue, Montreal, Quebec, Canada, commencing 10:44 a.m., on the above date,

* * *

[5] **Q:** * * * Mr. Furlinger, what is the name of the company that employs you?

A: The name of the company is Bombardier-Rotax GmbH.

Q: Can we agree that company for purposes of this deposition is Rotax to make it easier for me?

A: Yes; for me easier, too.

Q: Good.

And can you tell me where [6] that company is physically located?

A: The company is physically located in Gunsvirchen, Austria.

Q: And would you tell me what is the business of the company, Rotax?

A: The business of the company Rotax is to produce engines for various applications.

Q: And would you tell the jury, in this case, I guess, the court, what kind of engines Rotax produces?

A: Engines of ultra-lights; in this particular case, for snowmobiles, ATV's, motorcycles and Sea Do's.

Q: A Sea Do is a water craft?

A: Water Craft.

Q: Does Rotax produce engines for manufacturers other than Bombardier?

A: Yes.

Q: Would you tell us the manufacturer for whom Rotax produces engines?

A: It's Abrillia and BMW.

Q: Now, Abrillia is an Italian motorcycle manufacturer, is it not?

[7] **A:** That's correct; it's an Italian motorcycle manufacturer.

* * *

[10] **A:** My current position is Director for New Business Development.

Q: How long have you held that position, Mr. Furlinger?

A: Since first of September this [11] year.

Q: Congratulations.

How about before the first of September?

A: Before, I was in the function of a V.P., Rotax Aircraft Engines.

Q: Did you say V.P.?

A: Yes.

Q: Is that equivalent to vice president?

A: Correct.

Q: And in that capacity Mr. Furlinger, what were your duties?

A: I was responsible for the business for Rotax aircraft engines only.

Q: How long were you responsible for the business of Rotax aircraft engines?

A: Approximately, four years.

* * *

[14] Q: Now, does Rotax sell engines to Bombardier for use in Bombardier-manufactured water craft and ATV's?

A: We sell engines to Bombardier, Inc., as I said, before for snowmobiles, Sea-Do's and ATV.

Q: Is a Sea-Do a water craft?

A: Yes.

Q: And do you know that bombardier sells Sea-Do's, snowmobiles and ATV's in the U.S.?

A: I'm not involved in the detail business with Bombardier, so I can only assume that product will be found in the U.S., can be found in the U.S. or would be [15] used in the U.S.

* * *

[16] Q: I would like to talk to you about aircraft engines. When you use the term aircraft engines, what do you mean?

A: I mean ultra-light engines.

Q: And what is an ultra-light engine?

What do you mean by that?

A: It's a very broad definition. It's various from different states, I mean countries. Depends on the national regulations.

Q: All right. Is there some understanding you have of the term ultra-light that you can give us?

A: Well, it's a very small, light aircraft, noncertified, which is limited in weight and capacity.

* * *

[19] Q: All right. Who is the authorized distributor for the United States?

A: Kodiak Research Limited, Nassau Bahamas.

Q: And does Kodiak Research Limited Nassau Bahamas have a territory that includes the United States?

[20] **A:** Yes, Kodiak Research Nassau Bahamas – I would say Kodiak –

Q: Let's call it Kodiak.

A: – is a North and South American distributor for Rotax ultra-light aircraft engines.

* * *

Q: Did the territory in the United States that Rotax gave Kodiak for sale of Rotax engines include the state of New Jersey?

A: We did not specify any specific state. But, it means the entire U.S.

Q: It means all the states of the U.S., is that a fair statement?

A: That's a fair statement.

Q: What is Rotax – what is Kodiak [21] supposed to do with the Rotax engines within the territory of the United States?

A: He has to set up the proper after-sales service.

Q: Proper what service?

A: After-sales service.

Q: After-sales service. Okay.

A: And to support the product.

Q: All right. Now, would you explain to us what you mean by "he has to set up proper after-sales service to support the product"?

A: Well, provide documentation like any normal distributor does; provide spare parts.

Q: How about service instructions, do you have to do that, too?

A: Documentation which have been produced, yes.

* * *

[22] **Q:** And in the case of the United States, you supply or sell these manuals, these spare parts catalogs and service instructions to Kodiak?

A: Correct.

Q: And Kodiak is supposed to supply them to customers in the U.S.?

A: He can supply everywhere to his, within his given territory.

[23] **Q:** All right. And his given territory is all the states of the USA among others, correct?

A: South America; including North America.

Q: I understand.

I want to focus, if I can, on North America and, in particular, New Jersey. But Kodiak's responsibility includes supplying of spare parts catalogs and service instructions to the states of the United States, is that right?

A: Sorry?

Q: Does Kodiak's responsibility include the sale or supply of spare parts catalogs and service instructions throughout the United States?

A: Yes.

Q: All right. Now, you mentioned also that Rotax builds spare parts for its engines, is that correct?

A: Certain spare parts, yes.

Q: Does Kodiak supply, I'm sorry, does Rotax supply or sell spare parts to [24] Kodiak as well?

A: Yes, Rotax sells spare parts to Kodiak.

Q: Does Kodiak also have the responsibility to make those spare parts available throughout the United States?

A: Yes.

Q: Including the state of New Jersey?

A: I would, as I said before, it has no restriction.

Q: All right, Now, how long has Kodiak performed the responsibilities that you have described for us with regard to the sale and support and sale of spare parts for Rotax engines?

A—Kodiak, Nassau Bahamas, approximately, since '92.

Q: Is Rotax satisfied with the performance of Kodiak in the sale and support of Rotax engines in the U.S.?

A: Rotax is satisfied with the performance of Kodiak.

Q: All right. Now, does Rotax require certain performance goals by Kodiak [25] in the sales of Rotax engines?

A: Can you specify what you understand the performance goals?

Q: By performance goals, I mean minimum sales in dollars or marks, whatever.

A: Yes.

* * *

Q: All right. And does Rotax expect Kodiak to actively pursue the sales of Rotax engines and spare parts in the United States?

[26] **A:** What do you mean with actively?

Q: To work hard and aggressively to increase the sales each year, if possible, of Rotax engines and spare parts in the U.S.?

A: I think that is the duty of an authorized distributor to be, to sell product.

* * *

Q: All right. Now, is Kodiak expected to promote Rotax engines in the [27] United States?

A: What do you mean promote? Can you describe promote for me?

Q: Sure. Advertise and encourage the purchase of Rotax engines for ultra-light use in the U.S. so as to sell as much as he can of Rotax engines and spare parts in that country.

A: I think this is his duty; and he, as a distributor, he would do his best.

* * *

[28] **Q:** Isn't there a written agreement between Rotax and Kodiak?

A: Yes.

* * *

Q: Doesn't the written agreement require Kodiak to establish a system of [29] dealers?

A: Yes.

* * *

Q: *** Were you aware that Kodiak did appoint dealers in the United States for the sale of Rotax engines?

A: Yes.

Q: And how many dealers did Kodiak appoint in the United States?

A: By my actual knowledge, I think it's four.

Q: Is one of those dealers a company in Mississippi?

A: Yes.

* * *

[31] **Q:** Have you met all of the dealers?

A: Of the four dealers which I'm aware of, I have met all four.

* * *

[34] **Q:** *** What is the reason that Rotax wants Kodiak to establish dealers in the U.S.?

A: As I said before, the product support is one of important thing.

Q: Tell us why that is.

A: Well, it's to have an access to spare parts.

Q: Access to spare parts by whom?

A: By users.

Q: You mean by someone who buys a Rotax engine for an ultra-light if he needs spare parts, you want to be able to have people who are available to supply those spare parts? Is that part of product suppo[illegible]

A: Yes.

* * *

[38] **Q:** Are there also service centers for Rotax engines in the United States?

A: We have, as I said, dealers from Kodiak which it's, that is the four centers. [39] Those are service centers from Kodiak.

Q: Are they the only service centers for Rotax engines in the U.S., just those four dealers?

A: By my knowledge, yes.

* * *

[47] **Q:** *** Has Rotax ever suggested retail prices for its products?

[48] **A:** We do have suggested retail price, but it's only recommendations.

* * *

[50] **Q:** *** I want to know what your meaning, Rotax's idea is behind the suggested retail price.

A: That's the idea that we have. It's the price, approximately the price what an end user should pay for it.

Q: Is an end user a person who buys an engine, an aircraft engine, for example, for his ultra-light?

A: Who buys a single engine for whatever kind of use.

* * *

[53] **Q:** And in this document, it would be – let's start with the first page of it. It says, "Circular Letter," the cover page. Is that a document prepared by Rotax?

A: Yes.

Q: And is that a document that was sent to Kodiak?

A: It's sent to every Rotax authorized distributor for ultra-light aircraft engines.

* * *

[56] **Q:** Well, does that mean that as of the time they got this document, Kodiak has to use the logo, "Rotax Aircraft Engines"?

A: I mean that is what says here is exactly what we meant.

* * *

Q: * * * "Any offense against this ruling will result [57] automatically in cancellation of the contract." Have I read that correctly?

A: Yes.

Q: Cancellation of what contract?

A: Well, due to the fact that this went out to all our authorized distributor.

Q: Cancellation of what contract, the distributor contract?

A: Distributor contract.

Q: Then, it goes on to say here under number 2, "Publication, advertising insertions, et cetera, we want to point out that you as a distributor of Bombardier Rotax Aircraft Engines are obliged to send us a copy of the respective publications, advertise materials about Rotax and products of Rotax, videos, statements to authorities," and then it says, "before publication." Have I read that correctly?

A: Yes.

Q: Does that mean that if the distributor wants to use any of those things, an advertisement, an article, a video, or a statement to authorities, he has [58] to send it to Rotax before he publishes it?

A: What is stated here, yes.

Q: That's what it says, yes.

A: That's what it says, yes.

* * *

[61 **Q:** * * * So, as far as you know, any authorized Rotax service center for aircraft engines is one of those four dealers we talked about?

A: Yes.

* * *

[64] **Q:** * * * Well, is advertising placing of an article or picture or writing in a trade publication that mentions Rotax aircraft engines advertising to you?

A: Yes.

Q: Is that designed to help sell Rotax engines when such advertisements are placed?

A: In general, it would help so.

Q: Are you aware of advertising for Rotax engines placed in publications in the U.S.?

A: Yes.

Q: Can you name the publications that you are aware of that have Rotax aircraft advertising in it?

A: Experimental Aircraft Association. That's a flying magazine.

* * *

[67] **Q:** Has Rotax supplied copy for use in advertising for Kodiak?

* * *

A: With the letter when I see it, it was sent, one of CD-Rom which is specifying the logo.

* * *

[68] **Q:** * * * If Kodiak wanted to use the Rotax logo in an advertisement, he would first have to send that ad to Rotax for approval, correct?

A: Yes.

* * *

Q: * * * I will show you what has been marked for identification Exhibit Furlinger-1. Do you recognize that [69] document?

A: It's a Bombardier-Rotax GmbH International Aircraft Engine Distributor Agreement.

Q: Is that the agreement that's between Kodiak and Rotax?

A: What it says here, yes, Research Limited, Nassau.

Q: It's a document that was, that is between two parties, Rotax and Kodiak?

A: Correct.

Q: Do you know who drafted that document?

* * *

A: Well, it's a lawyer who drafted it for Rotax.

* * *

[70] **Q:** * * * Does Rotax have a limited warranty that goes with the engines it sells?

A: Yes.

Q: And does Rotax – is that warranty in writing?

A: The warranty is in writing.

Q: And can you tell me if that written warranty goes with the engines when the engines are sold?

A: Well, it's a part of the operator's manual.

Q: Okay. And that operator's manual goes with the engines, right?

A: Correct.

* * *

[71] Q: * * * And how does the end user make claim under that warranty?

A: He has to go back to the authorized distributor.

Q: That would be Kodiak if it's the U.S.?

A: Kodiak.

Q: Then, what does Kodiak have to do?

A: Well, Kodiak would handle the warranty.

Q: And then does Kodiak get reimbursed by Rotax for what Kodiak did under the warranty?

A: He can go back to us and get reimbursed.

[72] Q: All right. And who makes the decision how much Kodiak gets reimbursed for the warranty?

A: Well, there is a standard procedure for which is specified the parts and specified the labor, what's labor allowance. And according to this, it would be very clear how much a reimbursement would be.

Q: Who established that reimbursement schedule?

A: Rotax.

Q: And who established the price of the part for reimbursement?

A: Well, that's – the parts is based on the spare parts price.

Q: Which is established by Rotax?

A: Yes.

Q: Now, does Rotax build any aircraft engines that are certified by the Federal Aviation Administration?

A: Well, the engines are certified by the Austrian Civil Aviation Authority.

Q: Did Rotax go through the [73] certification process with the Austrian Civil Aviation Authority?

A: Yes.

Q: What model Rotax engines are certified?

A: Well, 912A which is certified and 912F; the 912S and 914F. There are a few others which are not anymore in production since long time.

* * *

Q: Bilateral agreement. So the judge understands what that is, is that an agreement that exists between Austria and the United States that if the Austrian authorities certify the engine, the Federal Aviation Administration will accept that [74] certification for U.S. purposes?

A: I think that's the general understanding.

Q: All right. So, would it be correct to say that at least some of those engine models are certified aircraft engines for U.S. use?

A: It's a very broad definition, yes.

* * *

Q: So, Rotax obtained the certification in Austria?

A: In Austria, yes.

* * *

Q: *** Did the FAA give Rotax also evidence of certification under U.S. law pursuant to the bilateral agreement?

[75] **A:** Yes.

* * *

[76] **Q:** Are you familiar with something called the Experimental Aircraft Association?

A: Yes.

Q: Have you ever been to their annual gathering in Oshkosh, Wisconsin?

A: Yes.

* * *

[79] **Q:** Is Sun 'N Fun another gathering of the Experimental Aircraft Association this time in Lakeland, Florida?

A: Yes.

Q: Have you ever been to Sun 'N Fun?

A: Yes.

Q: How many times?

A: Maybe two or three times.

Q: Has there been a facility that advertised Rotax engines at that Sun 'N Fun when you were there?

A: Yes, there has been a facility.

* * *

[80] **Q:** * * * In that stand or booth, have there been Rotax engines?

A: So far as my recollection is, yes.

Q: Have there been Rotax advertising?

A: I saw Rotax there, but if it's advertising, that is the question of definition.

Q: Does it say Rotax?

A: Yes.

* * *

[82] **Q:** * * * I'm talking about a mechanical problem where an owner, an end user, has a technical question.

A: Well, that's the reason why we have authorized distributors.

Q: So, if there is an end user who has a technical problem with his engine, who does he first have to go to for an answer under the Rotax distribution arrangement?

A: To an authorized distributor.

Q: Which in this case in the U.S. would be Kodiak?

A: Kodiak.

* * *

[83] **Q:** So, Rotax has an after-sales department. That does what?

A: Does support or to the Rotax aircraft engines.

* * *

Q: If Kodiak contacts the after-sales department at Rotax, Kodiak will get an answer?

A: Yes.

* * *

[84] **Q:** Does Rotax require Kodiak to investigate accidents involving Rotax engines?

A: Well, Kodiak is responsible for territory and this includes warranty investigations also.

Q: Kodiak has the responsibility according to Rotax to investigate accidents [85] in its territory involving Rotax engines?

A: Yes.

* * *

[93] **Q:** I thought that Kodiak had North America as its territory.

A: Well, Kodiak is the authorized distributor for North and South America, excluding Canada.

* * *

[96] **Q:** Does Mr. Tucker investigate accidents involving Rotax engines in the U.S.?

A: Well, in this case what we talking today, he is the investigator by the NTSB.

* * *

[99] **Q:** Who is it who designs Rotax engines, aircraft engines?

A: Rotax.

Q: Who is it that selects the materials for use in Rotax engines, aircraft engines?

A: Rotax.

Q: Who is it writes the operator's [100] manual for Rotax aircraft engines?

A: Rotax does.

Q: Who is it that writes the warranties for Rotax aircraft engines?

A: Rotax.

Q: Who pays for the warranty of the Rotax engines?

A: If it's a warranty, we give a credit.

Q: Who is it that makes parts for Rotax aircraft engines?

A: Rotax.

Q: Who is it that designates the territories for Rotax aircraft engines' sales?

A: Rotax.

Q: Who is it that determines whether an aircraft engine has to be recalled for modification?

* * *

A: Rotax will determine.

[101] **Q:** Who is it who issues Service Bulletins and literature for Rotax engines?

A: Rotax.

Q: Who is it that established the logo for Rotax aircraft engines?

A: Rotax.

* * *

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
TRENTON DIVISION

THEODORE KOZIOL and
LOIS KOZIOL,

Plaintiffs,

CIVIL ACTION
NO. 00.1938 (GEB)

vs.

BOMBARDIER-ROTAX GmbH,
[et al.]

Defendants.

* * *

DEPOSITION OF: PHILLIP JOHN LOCKWOOD

DATE: Tuesday, December 3, 2002

TIME: 10:07 a.m.

PLACE: The Reporting Company
201 North Magnolia Avenue
Orlando, Florida

* * *

[13] Q The question that I think I asked, and your response was, if you were going to try to [14] contact the company, how do you go about doing that, and you said it's all through – did you say Rotech?

A It's Kodiak Research.

Q Okay. So all of your communications to the factory in Austria go through Kodiak Research.

A For uncertified engines.

Q Okay.

A Which the 582 would be, the example you're using.

Q Right. Okay.

* * *

[15] Q So if you want to put a Rotax engine – if one of your customers wants to put a Rotax engine in an experimental or ultralight aircraft, your only source of obtaining a new one of those engines is through Kodiak Research.

A An experimental, yes.

* * *

[19] Q Where do they come from?

A They come from a freight forwarder down in South Florida.

* * *

Q * * * So what you do know is that you call Kodiak, and you – or you fax or you e-mail an order to Kodiak, and at some time thereafter, an engine shows up in Sebring, Florida.

A Correct.

* * *

[21] Q Is there a dealership network set up through Kodiak to receive and sell the engines?

A No, Kodiak – no. Kodiak will only sell to myself and the handful of other Rotax service center type operations.

Q Okay. And they're called service centers?

A We call ourselves service centers, yeah, because we specialize in the light aircraft parts and accessories that the aircraft that use Rotax need, including the parts for the engines themselves.

* * *

[26] Q *** Does the factory or does Kodiak send representatives to any of the air shows, that you're aware of?

A I think they rely on us, for the most part, to represent the product. But –

[27] Q When you say us, you mean the service center?

A Correct.

Q Okay. Go ahead.

A But they have – Kodiak has had people at the air show to help with technical support and that sort of thing before.

Q Okay. And do they – when they come to an air show, let's say where you are, do they operate out of your location, or –

A It's changed from year to year.

Q So there are times when they have a separate booth that they set up?

A Yes.

Q And when they do that, what – do they use the name Kodiak Research as their booth?

A I believe so.

Q At the last Sun'n Fun that you went to, did Kodiak have a booth there?

A Yes.

Q Okay. And you also had a booth.

A Correct.

Q How about any of the other service centers, did they have a booth?

A Yes. Yes.

* * *

[31] Q Now, we talked about the four other service centers for the uncertified aircraft engines. Is there any understanding, whether it's written, verbal, or otherwise, with regard to the distribution territory of those service centers?

A We tend to operate primarily in our region of the United States. But we are – and that's where most of our business is, is in the Southeastern US.

Q So Lockwood is primarily southeast.

A Yeah.

Q California Power Systems would be the Pacific.

A Right.

* * *

[46] Q * * * What else do they give you?

A Kodiak supplies the sales brochures for shows. That's it.

Q Is there a price list that Kodiak prepares?

A Yes.

Q And they send that to you how often?

A Electronically.

Q Okay.

A There's no set time frame. Whenever it changes * * *

Q What other documents do they send to you electronically?

A Service bulletins.

* * *

[51] Q * * * Lockwood Aviation Supply is a dealer of Rotax engines, correct?

A Yes.

* * *

[56] Q Are there instructions that you've received from any entity regarding the use of the logo?

A Kodiak has told us we have to use that logo, and that's all we can use.

* * *

Q Did anybody provide the logo to you in any format, whether it's online?

A Sure.

Q Okay. So that you had the right size and dimensions and the fonts.

A Absolutely.

Q Okay. Who provided it to you?

[57] A Kodiak.

* * *

Q In the sale of Rotax engines, do you use any other logo?

A No.

* * *

[63] Q How about warranty work?

A We have to provide warranty work.

Q And how is that handled?

A A customer would contact us with a problem, we would determine whether or not it's warrantable. Any we would make the repair normally and make a claim to Kodiak.

* * *

[71] Q All right. So when you talk to Eric about problems you're having out in the field as a ser e center, he knows that these are problems that are involving aircraft engines.

A Correct.

* * *

[72] Q Now, when you met at the factory, and you talked to Josef Furlinger, he knew also that you were buying aircraft engines.

* * *

A I would make that assumption.

Q Well, I mean, based on the conversations you had, was it clear to you that he knew that you were taking the – these Rotax engines and putting them in ultralights?

A Correct.

* * *

[82] Q Are you given any incentives in the sale of the Rotax engines with regard to getting more money if you sell more engines, getting a higher percentage if you sell more engines, things like that?

A They have – yeah, they will give a credit to our account of some arbitrary amount, and I have no idea how they come up with it, based on the service center sales relative to the other service centers.

* * *

[90] Q When was the last one?

A It was in April of 2000 – of 2002.

* * *

Q Were there representatives there from each of the service centers?

A Yes.

Q Where was it held?

A In the Bahamas.

* * *

A It was held in a leased office at the – at an FBO right at the airport in Nassau.

* * *

[91] Q Who from Kodiak, that you can remember?

A Pascal and Eric.

Q And just tell me generally some of the discussion that – some of the topics that were discussed.

A Service bulletins were discussed. They asked for input from us. They gave us feedback on how they felt we were performing, the service centers. And they handed out awards based on –

Q For?

A For performance in different areas, technical support, overall service center performance, air show support, web page support. That sort of thing.

Q Did Lockwood Aviation Supply receive any awards?

A Yes.

* * *

[98] A The only compensation I get for warranty is – you know, it's directly from Kodiak. They have a service dollar deal, which is very vague, and they use some formula that I mentioned before which I have no idea how they come up with it. But it's based on your overall performance, warranty support, technical support, air show attendance, and they give some credit based on that. It's a relatively small amount.

[99] Q Okay. What kind of credit did you get?

A There, again, I would have to guess, but I think it's in the neighborhood of ten thousand dollars.

Q And what your talking about is if you – if you have a certain satisfaction level with the customers for the warranty work, and you're meeting whatever criteria they set out, and you're doing the other service related things, like attending air shows or trade shows or things like that, them you're encouraged to do that by getting a credit back from –

A Kodiak.

Q – Kodiak? And in your case, it was about ten thousand dollars.

A (Witness nods head.)

* * *

[109] Q Based upon your conversations with Mr. Furlinger, your observations of what they were doing in there, he knows that – that Rotax makes [110] uncertified aircraft engines, correct?

A Yes.

Q And he knows that you, amongst others, were part of the network for distribution of those engines in the United States.

A Yes.

Q Do you have any input into the estimates that are made of the number of engines that they are going to need to manufacture? For instance, "We sold sixty-five engines this year."

A The limit to my input is how many engines I expect to sell.

Q Okay.

A That's it.

Q And that input is where?

A Kodiak.

* * *

[111] Q Has any representative of Kodiak ever been in your business? By that, I mean, visited your business.

A Eric Tucker.

Q Several times?

A Yes.

Q And how about the other principal?

A I believe Pascal has been to my facility.

* * *

APPENDIX K

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

THEODORE KOZIOL and LOIS KOZIOL Plaintiffs, vs. BOMBARDIER-ROTAX GmbH, MOTORENFABRIK; [et al.] Defendants.	* * * * * * * * *	CIVIL ACTION NO. 00-1938(GEB)

ORAL DEPOSITION

OF

PASCAL RONVEAUX

APRIL 30, 2002

* * *

[14] Q. Now, the question that was pending was whether you were the founder of Kodiak Research, Limited in 1991?

A. I am the president of it, yes.

* * *

[22] A. Technical services and accident investigation, also and warrantee handling, warrantee evaluation, warrantee examination, whatever you want to call it.

Q. Okay. And how long has he done that for you?

A. Same like Mr. Tucker.

Q. Since, perhaps, the mid 1990s?

A. Right.

* * *

[27] Q. Were you ever covered on the Bombardier-Rotax's policy in 1999?

A. I believe so, but I don't know if –

Q. When did you cease being named or having insurance coverage under the Bombardier-Rotax's policy?

A. I believe January 2001.

* * *

[34] Q. Do you sell engine components or engines to maintenance facilities?

A. No, we have service centers.

* * *

Q. How about in the United States?

A. I am getting to it. I am trying to put them in alphabetical order, that's all. California Power System Inc., in California; South Mississippi's Ultra Light Inc., in Mississippi; LEAF Inc., Leading Edge Areas Foil in which is Wisconsin; and the last one is Lockwood, L-O-C-K-W-O-O-D, Aviation Inc., in Sebring, Florida, I believe to the best of [35] my knowledge is the latest service.

Q. The California Powers System, Southern Mississippi Ultra Light, LEAF, and Lockwood are the four in the United States?

A. Yes, they are.

Q. Are they also authorized distributors for the engines and engine components?

A. They are service centers, they can sell engines, yes.

* * *

Q. Now, let's go back to the Rotax aviation engines that are distributed by your company. Can you tell me what model you distribute?

A. Yes.

Q. And what models are they?

A. Rotax 447 UL, Rotax 503 UL, Rotax 582 UL, and Rotax 912 series.

* * *

[43] Q. How were they physically shipped? Are they crated or how do they leave Gunskinchen?

A. They are in boxes.

Q. Okay. Do they come with any manuals or warrantee documents or is it just the engines themselves?

A. They come with the manuals and a warrantee card.

Q. And what do the warrantee cards say? Do they identify your company as the warrantee administrator?

A. At the time, I believe so.

[44] Q. At that time?

A. Well, I don't know for that time. I believe so, yes.

Q. Has there been a change?

A. Not that I remember.

Q. Okay. And what kind of manuals would come in the boxes with the engines?

A. Operator manuals, in English and in German.

* * *

Q. *** then that would happen when the engines would come to The Bahamas? What would you do with them, if anything, after they were shipped and you received them in The Bahamas?

A. We would just forward them to the service center or the OEM.

Q. You didn't open them or inspect the boxes?

A. No.

Q. Now, did you handle customs, or how do you handle customs? Do you pay duty on the engines?

A. There is no duty on aircraft engines. There is no duty on aircraft engines, just on some parts sometimes.

* * *

[64] Q. You state in paragraph 3 that, "Kodiak has a supply arrangement with Paladin Industries, Inc., of Pennsauken, New Jersey. Kodiak did not enter into this arrangement until after plaintiffs filed their complaint."

When did the plaintiff file their complaint?

* * *

A. About year 2000.

* * *

[65] Q. When did you enter into your supply arrangement with Paladin Industries?

* * *

A. * * * I know it was after 2000.

Q. Okay, now, what do you mean by "supply arrangement"?

A. We sold engines to them.

* * *

Q. * * * And do you keep a file on Paladin Industries as part of your record?

[66] A. We keep it on computer, yes.

* * *

Q. * * * Let's go to paragraph 4. "Kodiak provides an information website from The Bahamas that may be accessed in New Jersey."

What do you mean by that?

* * *

A. That we have a website accessible from anywhere in the world.

Q. What do you mean by "informational website"?

A. You have information on where to buy the parts or the engines.

* * *

[78] Q. * * * Now, I take it even though I don't have the document in front of me that the OEM requirements

require companies such as Paladin Industries to maintain, it says, a requirement of $50,000 in sales?

A. Yes.

Q. Okay. Is that engine sales, part sales; what exactly do you mean by requirement of $50,000 in sales?

A. Engine sales.

* * *

[84] Q. Do you have a breakdown, a monthly breakdown on how many engines are shipped in and out of The Bahamas; any Bombardier-Rotax ultra light engines?

* * *

MS. SLAVIN: Yes, I just want to know how many. Are we talking about a thousand, or just what we are looking at.

THE WITNESS: Per month?

* * *

Q. How about in 1999, 2000?

A. Your estimate is about right.

* * *

[85] A. You said a thousand engines.

Q. My, I guess pretty well, then. Is that figure true today?

A. Yes, per year, yes.

Q. Now, is it your testimony, if I understand correctly, that your company has not sold any Bombardier aircraft engines to anyone in the United States other than

the original equipment manufacturer or authorized service center?

A. Our company only sells to North and South American service centers or OEMs, yes, that is correct.

Q. And the same is true for replacement engine parts s that correct only OEMs or service centers?

A. Yes.

* * *

Q. *** Have you ever been to Sun and Fun in Lakeland, Florida?

A. Yes, I have been there.

Q. And why were you there?

A. To visit my OEM and service centers.

Q. *** how many times have you gone to Sun and Fun?

A. A number of times.

* * *

APPENDIX L

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

Case No. 02-61807-CIV-COHN/SELTZER

THEODORE KOZIOL and
LOIS KOZIOL,

Plaintiffs,

vs.

BOMBARDIER-ROTAX [et al]
GmbH MOTORENFABRIK,

Defendants. /

AFFIDAVIT OF ALAN J. BURROWS [. . .]

ALAN J. BURROWS, declares under penalty of perjury under the laws of the United States, that the statements contained in this Affidavit in Further Support of Kodiak's Motion to Dismiss the Complaint for Lack of Personal Jurisdiction to be true and correct.

1. I, ALAN J. BURROWS, am the President of Tropix Air Limited ("Tropix Air"), which is a corporation formed under the laws of the Bahamas, having its principal and only place of business in Nassau, Bahamas. I am also an officer of Tropix Express, Inc., a Florida corporation.

* * *

6. When Tropix Air is hired to deliver a shipment to the United States it delivers the shipment to Miami, Florida, at which point, Tropix Express, Inc. ("Tropix Express"), a separate Florida corporation created in or

about 1995, receives the shipment and delivers it to the location within the United States.

* * *

8. Tropix Air has been hired by Kodiak Research, Ltd. ("Kodiak") to deliver aircraft engines to the United States and elsewhere.

* * *

13. Tropix Air uses Miami, Florida as its port of entry for *all* shipments into the United States and did so for more than five years *before* Tropix Air shipped any engines for Kodiak.

* * *

18. Tropix Air offers residents of the Bahamas the service of collecting mail and parcels in the United States and then delivering the mail and parcels to its customers in the Bahamas.

19. This service offered by Tropix Air involves having mail and parcels delivered to customers "care of" Tropix Express. The mail and parcels are then forwarded by Tropix Express to Tropix Air and then Tropix Air delivers the mail and parcels to the respective customers in the Bahamas. * * *

20. Tropic Air has hundreds of customers for whom mail and parcels are collected in the United States and delivered in the Bahamas. This service is popular because many residents of the Bahamas consider the postal service in the Bahamas to be less speedy and reliable than the U.S. Mail.

21. The Ronveaux family, including Pascal Ronveaux, his young daughter Charlotte Ronveaux and his

wife, Brigitte M. Ronveaux, uses our services from time to time.

* * *

FURTHER AFFIANT SAYETH NAUGHT.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on the 13 day of November, 2003.

/s/ Alan J. Burrows
Alan J. Burrows, President
Tropix Air Limited

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
TRENTON DIVISION

THEODORE KOZIOL
AND LOIS KOZIOL,

Plaintiffs,

vs.

BOMBARDIER-ROTAX GmbH,
[et al.]

Defendants.

CIVIL ACTION
NO. 00.1938 (GEB)

* * *

DEPOSITION OF:	RONALD LAVON SMITH
DATE:	Tuesday, December 3, 2002
TIME:	12:49 p.m.
PLACE:	The Reporting Company 201 North Magnolia Avenue Orlando, Florida

* * *

[49] Q *** Do you know if Kodiak has warehouse base or storage space in locations outside of the Bahamas?

A Do they have warehouse space?

Q Yeah.

A As far as I know, they do.

Q Where?

A In Fort Lauderdale.

* * *

[50] A I went to pick up some old engines, or some new engines that had been – that was in a flood that had water damage for Quicksilver Enterprises. I went down and picked them up.

Q Was that an aircraft hangar that they had down there?

A I assume it was.

Q The old location, was it at the airport?

A Yeah, Executive Airport.

Q * * * when you buy an engine, do you pay freight?

A Correct.

Q From where to where?

A Fort Lauderdale.

Q So it – again, you told me that you're buying your engines from Kodiak, so it's their obligation to get the engine to Fort Lauderdale?

A (Witness nods head.)

Q Yes?

A. Correct.

* * *

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
TRENTON DIVISION

THEODORE KOZIOL
AND LOIS KOZIOL,

Plaintiffs,

CIVIL ACTION
NO. 00-1938 (GEB)

v.

BOMBARDIER-ROTAX GmbH,
[et al.]

Defendants.

DECLARATION OF DANIEL D. BARKS

I, Daniel D. Barks, under penalty of perjury do declare the following to be true:

* * *

3. I have attended the air show, known as "Sun-N-Fun" at Lakeland Linder Regional Airport, adjacent to the town of Lakeland, Florida for the past four years.

4. From 1998 until the present, upon each visit to "Sun-N-Fun" there has been a display tent erected in the vendors and manufacturers display area, identified as ROTAX.

* * *

5. From 1998 until the present these tents have had on display engines manufactured and sold by ROTAX, and personnel uniformed in ROTAX sport shirts providing information on sales and technical specifications;

* * *

7. During Sun-N-Fun events starting this year on Wednesday April 2, 2003, I personally observed the ROTAX tent in operation again and saw and identified Erick Tucker working inside the tent, meeting and greeting customers.

* * *

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 13th day of May, 2003.

/s/ Daniel D. Barks
DANIEL D. BARKS

APPENDIX O

THEODORE KOZIOL and LOIS KOZIOL, Plaintiff, v. BOMBARDIER-ROTAX GmbH, [et al.] Defendants.	CIVIL ACTION No. 00-1938 (GEB) **DECLARATION OF BMW OF NORTH AMERICA, LLC**

DECLARATION OF BMW OF NORTH AMERICA, LLC

I ROBERT GOODHEART, declare as follows:

1. I am the manager of the Aftersales Department of the Motorcycle Division of BMW of North America, LLC ("BMW NA"). I have been employed by BMW NA since 1988.

2. Bombardier-Rotax GmbH & Co. located in Gunskirchen, Austria builds a 650cc single cylinder motorcycle engine (the "Rotax Engine") for BMW Motorad in Germany.

3. BMW Motorad imports F650 model motorcycles equipped with the Rotax Engines to BMW NA in the US.

4. The F650 model motorcycles with Rotax Engines were first available in the US in 1996 and are still distributed by BMW NA today.

5. BMW of North America has distributed the F650 motorcycles containing the Rotax Engine to motorcycle dealers located within the US as well as the state of New Jersey since 1996.

I declare under penalty of perjury under the laws of the State of New Jersey that the foregoing is true and correct.

Executed this day of January 2003.

/s/ Robert Goodheart
Robert Goodheart

APPENDIX P

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
TRENTON DIVISION

THEODORE KOZIOL and LOIS KOZIOL, Plaintiffs, v. BOMBARDIER-ROTAX GmbH, [et al.] Defendants.	CIVIL ACTION No. 00-1938 (GEB)

DECLARATION OF SHERI STERN

Sheri Stern does hereby declare and state:

1. I am the Office Manager of Glider Rider, Inc. located at 1085 Bailey Avenue, Chattanooga, TN 37404.

2. Glider Rider, Inc. is the publisher *Ultralight Flying!* magazine.

3. Since 1995, Lockwood Aviation, Inc. purchased advertising space, which marketed Rotax engines and/or the Rotax name, in our publications 97 times.

4. Since 1995, South Mississippi Light Aircraft, Inc. purchased advertising space, which marketed Rotax engines and/or the Rotax name, in our publications 84 times.

5. Currently, Glider Rider, Inc. distributed *Ultralight Flying!* magazine to 187 subscribers in the State of New Jersey.

* * *

8. This declaration is based upon my personal knowledge of our business and the records that have been subpoenaed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 29th day of November, 2002.

/s/ Sheri Stern
SHERI STERN

APPENDIX Q

KOZIOL v. ROTAX: Florida Bombardier Dealers

Company Name	Phone	Fax
Action Jet Ski West	941-484-8880	941-488-5636
B&H Motorsports	941-355-0323	941-355-2732
Barney's Motorcycle Sales, Inc.	727-576-1148	727-578-2105
Barney's Motorcycle Sales, Inc.	727-576-1148	727-578-2105
Beach Sportcycles, Inc.	321-631-5571	321-636-9283
Boats-R-Russ	941-748-9648	941-746-2291
Brevard Watercraft Inc.	321-242-0101	321-253-1014
Broward Motorsport	954-436-9905	954-433-0663
Citrus Cycle Center	352-726-6876	352-726-0110
Cycle Riders Suzuki of Orlando	407-295-0045	407-578-6823
Daytona Fun Machines	386-238-0888	386-253-6796
First City Honda Sea-Do	904-829-6416	904-808-8750
Florida Sports Cycle & Marine	772-287-1850	772-287-6852
Gulf Coast Marine Center, Inc.	941-629-9669	941-629-9992
Inner-Coastal Marina, Inc.	321-725-0090	321-723-3996
Jet Ski of Miami	305-634-5754	305-634-5045
Lake Placid Marine, Inc.	863-465-2335	863-465-9550
Motoport U.S.A.	305-264-4433	305-264-8336
Ocala Motor Sports	352-732-8531	352-620-8920
Palm Beach Motorcycles, LLC	561-683-1642	561-683-1877
Perry Performance Group, Inc.	954-929-1737	954-929-1737
Power Toys, Inc.	954-974-6100	954-917-8584

Powersports of Clearwater, Inc.	727-536-4791	727-535-0632
Powersports of Cutler Ridge	305-258-2000	305-258-4535
Powersports of Delray	561-274-9074	561-265-1012
Powersports of Ft. Lauderdale	954-467-0990	954-467-1015
Powersports of Kissimmee, Inc.	407-847-2453	407-518-1997
Powersports of Naples, Inc.	239-594-5535	239-594-2906
Powersports of North Miami	305-651-4999	305-651-3547
Powersports of Tampa, Inc.	813-968-7888	813-968-8448
Siminole Power Sports	407-322-3253	407-330-0346
Sky Powersports	863-676-2245	863-676-4283
Sky Powersports	863-676-2245	863-676-4283
Sky Powersports of Lakeland	863-682-4607	863-682-7082
Sky Powersports of Lakeland	863-682-4607	863-682-7082
Southeast Correct Craft, Inc.	407-851-1965	407-240-0898
Streit's Motorsports	352-376-2637	352-376-3360
Sun State Fun Sports	352-735-2900	352-735-1156
Suncoast Yamaha Suzuki & Seadoo	352-796-6116	352-796-6584
Team Savage	727-771-1211	727-771-1116
West Coast Motorcycles	239-275-5535	239-275-0823
XTREME Powersports, Inc.	813-626-6060	813-626-4387

APPENDIX R

UNITED STATES PATENT AND TRADEMARK OFFICE

[LOGO] **Trademark Electronic Search System (TESS)**

TESS was last updated on Tue Jan 14 04:33:17 EST 2003

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BOMBARDIER

ROTAX®

Word Mark	**BOMBARDIER ROTAX**
Goods and Services	IC 007. US 019 023. G & S: small internal combustion engines for machine operation, boats, and aircraft, and replacement parts thereof. FIRST USE: 19900500. FIRST USE IN COMMERCE: 19900500
Mark Drawing Code	(3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS
Design Search Code	150701 261110 261121
Serial Number	74261660
Filing Date	April 2, 1992
Published for Opposition	February 23, 1993
Registration Number	1771105

Registration Date	May 18, 1993
Owner	(REGISTRANT) Bombardier-Rotax GmbH CORPORATION AUSTRIA A-4623 Gunskirchen AUSTRIA
Attorney of Record	KAUSHAL R ODEDRA
Type of Mark	TRADEMARK
Register	PRINCIPAL
Affidavit Text	SECT 15. SECT 8 (6-YR).
Live/Dead Indicator	LIVE

APPENDIX S

Circular Letter: 19/98
Date: 98 04 20

Usage of the ROTAX® AIRCRAFT ENGINES logo

Dear Distributors!

* * *

We are pleased to introduce the new logo for ROTAX® AIRCRAFT ENGINES and we will allow you to use it under the following conditions:

a) You have to make sure that you are clearly identified as a distributor of Bombardier-Rotax products and not as agency or representation of such.

b) You have to agree to stop using of the Bombardier-Rotax trade mark the day you will cease as distributor of ours. You will further have to agree that any profit accruing from the use of said trade mark shall benefit to Bombardier-Rotax.

* * *

Circular Letter: 19/98
Date: 98 04 20

As an authorized distributor for ROTAX® AIRCRAFT ENGINES you are obliged as of now to use this new logo on any paper, documents, publication, etc. as follows:

AUTHORIZED DISTRIBUTOR FOR
ROTAX®
AIRCRAFT ENGINES

With introduction of the logo for ROTAX® AIRCRAFT ENGINES old versions of the logo must not be used any more on any publication.

Any offence against this ruling will result automatically in cancellation of the contract.

2. Publication, advertising, insertions, etc.:

We want to point out that you, as distributor of Bombardier-Rotax aircraft engines, are obliged to send us a copy of the respective publication, e.g.

- adverts
- articles about Rotax and products of Rotax
- videos
- statements to authorities before publication.

* * *

Thanking you for your cooperation.

With best regards,

BOMBARDIER-ROTAX GMBH

i. V. J. Fürlinger i. A. G. Hochreiter

APPENDIX T

STATEMENT OF PARTY REPRESENTATIVES TO NTSB INVESTIGATION

Aircraft Identification:

'Registration Number N/A

Make and Model SPRINT 100

Location LANEWOOD, NJ

Date 3-20-99

The undersigned hereby acknowledge that they are participating in the above-referenced aircraft accident field investigation (including any component tests and teardowns or simulator testing) on behalf of the party indicated adjacent to their name, for the purpose of providing technical assistance to the National Transportation Safety Board.

The undersigned further acknowledge that they have read the attached copy of 49 CFR Part 831 and have familiarized themselves with 49 CFR § 831.11, which governs participation in NTSB investigations and agree to abide by the provisions of this regulation.

It is understood that a party representative to an investigation may not be a person who also represents claimants or insurers. The placement of a signature hereon constitutes a representation that participation in this investigation is not on behalf of either claimants or insurers and that, while any information obtained may ultimately be used in litigation, participation is not for the purposes of preparing for litigation.

By placing their signatures hereon all participants agree that they will neither assert nor permit to be asserted on their behalf, any privilege in litigation, with respect to information or documents obtained during the course of and as a result of participation in the NTSB investigation as described above. It is understood, however, that this form is not intended to prevent the undersigned from participating in litigation arising out of the accident referred to above or to require disclosure of the undersigned's communications with counsel.

SIGNATURE NAME (Printed)
/s/ Ronald L. Smith RONALD L. SMITH
PARTY M. SQUAD DATE 3-30-99

SIGNATURE NAME (Printed)
/s/ Eric Tucker ERIC TUCKER
PARTY ROTAX NJ DATE 3-30-99

SIGNATURE NAME (Printed)
/s/ Greg McDonough GREG MCDONOUGH
PARTY AERONAUTICS DATE 3-30-99

AND NO OTHERS

SUPREME COURT, U.S.
FILED
FEB 14 2006
OFFICE OF THE CLERK

No. 05-633

IN THE

Supreme Court of the United States

THEODORE KOZIOL and LOIS KOZIOL, PETITIONERS

v.

BOMBARDIER-ROTAX GmbH MOTORENFABRIK; KODIAK RESEARCH LTD.; ROTECH RESEARCH CANADA LTD., a/k/a KODIAK RESEARCH CANADA, LTD.; AERO DISTRIBUTION LIMITED; AERO DISTRIBUTION INTERNATIONAL LIMITED; and PASCAL RONVEAUX,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT KODIAK RESEARCH LTD. IN OPPOSITION

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Counsel of Record
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Attorneys for Respondent Kodiak Research Ltd.

CURRY & TAYLOR • WASH D.C. • (202) 233-2160 • USSCINFO.COM

RULE 29.6

Pursuant to Rule 29(6) of the Rules of the Supreme Court of the United States, the Respondent Kodiak Research Ltd. states that the only parent corporation or publicly held company that owns 10% or more of the corporation's stock is The Lawrence Foundation.

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INTRODUCTION

In following long-established precedent, the United States Court of Appeals for the Eleventh Circuit in an unpublished opinion affirmed the dismissal of the lawsuit commenced by the Petitioners Theodore Koziol and Lois Koziol (the "Petitioners") against Kodiak Research Ltd. ("Kodiak"), a Bahamian corporation, Rotech Research Ltd. ("Rotech"), a Canadian corporation, and Bombardier-Rotax GmbH Motorenfabrik ("Rotax"), an Austrian corporation, based on a lack of personal jurisdiction. This was the latest in a string of federal court decisions in this case finding no personal jurisdiction over Kodiak, Rotech, and Rotax.

Two separate federal district courts have dismissed the Petitioners' claims against these defendants based on a lack of personal jurisdiction. First, on April 24, 2003, the United States District Court for the District of New Jersey dismissed Kodiak, Rotech and Rotax for lack of personal jurisdiction over those defendants in New Jersey (Pet.App. 39a) and issued a final order of dismissal closing the case. Kod.App. 1b-2b.[1] Rather than take a timely appeal of this final dismissal, the petitioners moved to modify the order of dismissal in order to have the United States District Court for the District of New Jersey transfer

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[1] Kod.App. refers to the Appendix attached to the Brief in Opposition filed on behalf of the Respondent Kodiak Research Ltd. Pet.App. refers to the Appendix attached to the Petition for Certiorari. Docket entries for the courts below are referenced as follows: United States District Court for the District of New Jersey ("NJ-00 Dkt."); United States District Court for the Southern District of Florida ("FL-02 Dkt."); and United States Court of Appeals for the Eleventh Circuit ("11th Cir. Dkt.").

the case to the United States District Court for the Southern District of Florida.[2] As set forth in the Motion to Modify, the purpose of the transfer was not to further litigate the issue of personal jurisdiction in New Jersey, but to preserve the April 14, 2000 filing date of the New Jersey litigation to avoid the statute of limitations for the otherwise time-barred action commenced in Florida.[3] In seeking the modification, the Petitioners informed the New Jersey Federal District Court that their motion, if granted, "will eliminate any injustice caused by dismissing, for lack of personal jurisdiction [in New Jersey], this otherwise timely action."[4] The Motion to Modify was granted on May 22, 2003 (Pet.App. 18a-19a), thus converting the dismissal order from the New Jersey Federal District Court into a transfer order.

On August 20, 2003, the Florida Federal District Court consolidated the transferred case from the New Jersey Federal District Court with a filed but never served separate action commenced by the Petitioners in the Florida Federal District Court. On March 22, 2004, after extensive briefing on the issue of personal jurisdiction in Florida, the Florida Federal District Court dismissed Kodiak, Rotech, and Rotax for lack of personal jurisdiction in Florida. Pet.App. 14a.

Throughout the time that the transferred case was pending in Florida, the Petitioners never moved to

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[2] Motion to Modify the Order of April 24, 2003 Dismissing the Complaint for Lack of Personal Jurisdiction, dated May 5, 2003 (the "Motion to Modify"), NJ-00 Dkt. 109.

[3] *Id.* at 3-5, 7-8.

[4] Plaintiffs' Reply in Support of Their Motion, Pursuant to Fed.R.Civ.P. 59(e) and Fed.R.Civ.P. 60(b), for Relief from the Dismissal Order Entered on April 24, 2003, at pp. 3-4, NJ-00 Dkt.111.

re-transfer the case to New Jersey, nor did they request that the Florida Federal District Court reconsider in any way the New Jersey Federal District Court's dismissal and transfer of the action. This is no true surprise, however, since the Petitioners after all were the ones that sought the transfer. Despite their failure to raise the issue of re-transfer with the Florida Federal District Court, as is procedurally required by the Eleventh Circuit to preserve appellate review, the Petitioners sought to appeal the New Jersey Federal District Court's dismissal directly to the Eleventh Circuit, along with the Florida Federal District Court's dismissal. The Eleventh Circuit declined to entertain the appeal of the New Jersey Federal District Court's ruling and granted a motion to dismiss that portion of the appeal. Pet.App. 16a. As for the ruling of the Florida Federal District Court on the issue of personal jurisdiction in Florida, the Eleventh Circuit rejected the arguments of the Petitioners on appeal and affirmed the dismissal of the action against Kodiak and the other Defendants. Pet.App. 8a.

The Petitioners now seek to resurrect the dismissal of the Bahamian Corporation Kodiak for lack of personal jurisdiction in New Jersey by arguing that there is a split in the circuits, where none exists, in an effort to take their case to this Court. As shown below, there is no such split in the circuits or any other compelling reason for this Court to grant certiorari on this point because the Petitioners failed to follow established legal precedent and move to re-transfer the case to New Jersey in order to preserve the New Jersey issues for further appellate review. Due to this tactical decision to keep the issue away from the Florida Federal District Court, the Petitioners are procedurally barred from appealing to this Court any of

the issues argued in the Petition for Writ of Certiorari relating to the decision of the New Jersey Federal District Court. As a result, the sole issue that remains open for consideration in the Petition for Writ of Certiorari is whether the analysis of general personal jurisdiction includes considerations of "reasonableness" or "fairness". On this issue, it is the Petitioners' position that a court applying a general jurisdiction long arm statute should ignore whether a finding of such jurisdiction would be reasonable or fair. As shown below, since there are no compelling reasons for granting a Writ of Certiorari for any of the arguments proffered by the Petitioners, the Petition should be denied.

STATEMENT OF THE CASE

1. THE ILLEGAL FLIGHT

On March 20, 1999, the Petitioner Theodore Koziol flew in the state of New Jersey as a passenger in a borrowed home built aircraft. NTSB Rpt. p. 1, NJ-00 Dkt. 48. The pilot informed the Petitioner Koziol before the flight commenced that the aircraft was not legal to fly under applicable Federal regulations because it carried too much fuel to qualify as an ultralight aircraft. *Id.* at p. 1d. Additionally, the flight was illegal because FAA regulations only allow dual occupancy of an ultralight (if otherwise legal, which this was not) for purposes of flight instruction, and Koziol emphatically denied to the NTSB that he was a student on the flight. *Id.* at pp. 1 & 1d.

On the day of the flight, the pilot initially told the Petitioner Koziol that the flight must be cancelled due to high winds, but later in the day the flight proceeded

after the pilot looked toward the windsock and said he "thought it would be all right to fly." *Id.* at p. 1. After the Petitioner Koziol was outfitted to fly, the engine was started, and then the engine stopped while the airplane was still on the ground. *Id.* According to the Petitioner Koziol, "[t]he motor was restarted, but no one said anything as to why it stopped." *Id.*

The aircraft headed down the runway for a downwind takeoff. *Id.* at p. 1a. As the takeoff roll commenced, the Petitioner Koziol felt gusts of wind. *Id.* Once airborne, while still flying downwind, the aircraft began to turn right. *Id.* The Petitioner Koziol described to NTSB what he experienced while in the right turn back towards the wind: "[i]t felt like a gust of wind turned the airplane to the right, and other gusts were forcing the airplane up and down." *Id.*

A witness said the plane reached an altitude of roughly 60 to 70 feet over 40 foot trees with the engine on. *Id.* at p. 1a. While in a right turn the engine stopped. *Id.* According to a witness, the plane glided for about two to four seconds after the stoppage, then began a gradual turn. *Id.* The turn increased sharply, and the plane "appeared to half-cartwheel." *Id.* According to the Petitioner Koziol, the pilot did not make any attempt to restart the engine.[5] *Id.* The Petitioner Koziol felt the aircraft "go out of control", and the aircraft impacted the ground. *Id.*

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[5] Prior to the accident, the Pilot had been quoted in a New Jersey newspaper as saying, "You're in control of your safety. You're as safe as your skill and training. Your engine could stop, but it means nothing. You can easily glide down to a safe landing if you have the skills." (NTSB Rpt., p. 1b, NJ-00 Dkt. 48).

II. KODIAK'S SALE OF THE ENGINE IN THE BAHAMAS

Kodiak, a Bahamian corporation with its principal place of business in Nassau, Bahamas, sells engines in the Bahamas. Ronveaux Afft. ¶¶ 1,5, FL-02 Dkt. 23. Kodiak sold a Bombardier-Rotax 582-UL light-aircraft engine serial number 5162734 (the "Engine") in the Bahamas to South Mississippi Light Aircraft ("South Mississippi"). *Id.* at ¶7. Title to the Engine passed to South Mississippi in the Bahamas, and Tropix Air Limited, ("Tropix Air"), another Bahamian company, shipped the Engine in question FOB Nassau, Bahamas to South Mississippi. *Id.* at ¶ 5; Burrows Afft. ¶¶ 12-15, FL-02 Dkt. 37. Kodiak paid Tropix Air for the shipment in Bahamian dollars by transferring the funds from Kodiak's Bahamian bank account to Tropix Air's Bahamian bank account. Burrows Afft. ¶¶ 12-16, FL-02 Dkt. 37.

Tropix Air then delivered the shipment to Miami, Florida, at which point, Tropix Express, Inc. ("Tropix Express"), a separate Florida corporation, received the shipment. *Id.* at ¶ 10-13. Tropix Air unilaterally decided to use Florida as the point of entry into the United States based on its relationship with Tropix Express, an independent Florida corporation with which Tropix Air unilaterally contracted for delivery. *Id.* at ¶ 6-7, 12-13. Tropix Express then took delivery of the goods as a freight forwarder and collected its shipping expenses from South Mississippi. *Id.* ¶ 15.

As shown above, Kodiak's involvement in the sale of the Engine ended when the Engine was purchased in the Bahamas by South Mississippi. Kodiak was not involved with the shipment of the

Engine into the United States since that was handled by Tropix Air, on behalf of South Mississippi. Kodiak was not involved with the transportation of the Engine in the United States since that was handled by Tropix Express, on behalf of Tropix Air. Kodiak had nothing to do with the installation of the Engine into the ultralight aircraft since it was an illegally constructed home built aircraft, which was not even legal to fly, let alone with a passenger.

Accordingly, there is no basis for the Petitioners to assert personal jurisdiction over Kodiak – as found by two Federal District Courts and one Circuit Court of Appeal.

REASONS FOR DENYING THE PETITION

I. THERE IS NO SPLIT AMONG THE CIRCUITS AS TO THE UNAVAILABILTY OF DIRECT APPELLATE REVIEW OF A TRANSFER ORDER ENTERED BY A TRANSFEROR DISTRICT COURT LOCATED IN A DIFFERENT REGIONAL CIRCUIT.

Contrary to the assertion of Petitioners, the circuits are unanimous that the appellate review of a transfer order entered by a transferor district court located in a different regional circuit may not be the subject of a direct appeal in the transferee circuit. Instead, the party seeking to preserve the issue for appeal must move for re-transfer in the transferee court. *See, e.g., Reyes v. DEA*, 834 F.2d 1093, 1095 (1st Cir. 1987) (challenge to transfer in transferee circuit needed to preserve for review); *Songbyrd, Inc. v. Estate of Grossman*, 206 F.3d 172, 177 (2d Cir. 2000) (re-transfer motion is required citing collected cases),

cert. denied, 531 U.S. 824 (2000); *Nascone v. Spudnuts, Inc.*, 735 F.2d 763, 765-776 (3d Cir. 1984) (re-transfer motion and mandamus upon denial required to appeal transfer order); *In re Carefirst of Maryland, Inc.*, 305 F.3d 253, 259 (4th Cir. 2002) (indirect review of transfer order available on denial of motion to re-transfer); *Painewebber, Inc. v. Chase Manhattan Private Bank*, 260 F. 3d 453, 458-59 (5th Cir. 2001)(motion to retransfer prior to addressing merits of transfer on appeal); *Moses v. Business Card Express, Inc.*, 929 F.2d 1131, 1136 (6th Cir. 1991) (indirect review on denial of motion to re-transfer), *cert. denied*, 502 U.S. 821 (1991); *National-Standard Co. v. Adamkus*, 881 F.2d 352, 356 (7th Cir. 1989) (transfer order not subject to review without motion to re-transfer) (citing 15 C. Wright, A. Miller and E. Cooper, Federal Practice and Procedure § 3846 at 359-60 (1986)); *In re Nine Mile Limited*, 673 F.2d 242, 244 (8th Cir. 1982) (motion to re-transfer appropriate method to seek review of transferred file (citing Wright and Miller § 3846)); *Posnanski v. Gibney*, 421 F.3d 977, 980-81 (9th Cir. 2005) (transferee circuit may only review denial of motion to re-transfer, not out of circuit transferor court order of transfer (citing Wright and Miller § 3846)); *FDIC v. McGlamery*, 74 F.3d 218, 222 (10th Cir. 1996) (re-transfer motion required for indirect review of transfer order for lack of personal jurisdiction); *Roofing & Sheet Metal Services, Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 989 (11th Cir. 1982) (motion to re-transfer appropriate means of seeking appellate review of outside circuit transfer order); *Starnes v. McGuire*, 512 F.2d 918, 924 (D.C. Cir. 1974) (motion to re-transfer appropriate course of action to preserve issue for review by transferee

circuit).[6] Where, as here, the Petitioners never sought re-transfer the issue is waived. *See, e.g., National-Standard*, 881 F.2d at 356 (right to appeal transfer waived when record shows no attempt to object to transfer order prior to appeal).

Since the Petitioners failed to make a motion to re-transfer the case back to the New Jersey Federal District Court, the Eleventh Circuit was following settled precedent when it dismissed the appeal as to issues relating to the transfer order entered by the New Jersey Federal District Court. Pet.App. 16a.

The Petitioners cite many cases in support of their contention that pre-transfer orders may be reviewed by the Circuit Court presiding over the transferee district court. However, none of the cited cases are applicable to the instant case involving the attempt by Petitioners to appeal the transfer order itself. For example, in *Chaiken v. VV Publishing Corp.*, 119 F.3d 1018, 1024-25 (2d Cir. 1997), *cert. denied*, 522 U.S. 1149 (1998) (Petition, at 13), the interlocutory order dismissing some, but not all, of the defendants was entered over eight months before the agreed transfer order was entered and was unrelated to the reason for the transfer. *Id.* The propriety of the transfer order itself was not appealed. *Id.* at 1025.

In other cases cited by Petitioners, the rulings by the respective transferor courts were on substantive legal issues whose determination was incorporated into the final judgment, rather than as here where the issues sought to be appealed relate only to the propriety of the transfer itself and have no bearing on the merits. *See, e.g., Tel-Phonic Services, Inc. v. TBS*

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[6] Public records indicate that Federal Circuit decisions are likewise in accord with the above-cited decisions.

Int'l, Inc., 975 F.2d 1134, 1137 (5th Cir. 1992) (dismissal of RICO claims); *Equal Employment Opportunity Comm'n v. Northwest Airlines, Inc.*, 188 F.3d 695, 697 (6th Cir. 1999) (summary judgment on sexual harassment claims); *Astarte Shipping Co. v. Allied Steel & Export Svc.*, 767 F.2d 86, 87 (5th Cir. 1985) (maritime attachment); Petition, at 13-14.

In sum, all of these cases are unlike the present case in which the Petitioners, by their own request to the New Jersey Federal District Court timely modified the final dismissal order into a transfer order, which they now seek to appeal. Had the Petitioners elected to appeal the final dismissal to the Third Circuit, they could have done so since that final dismissal closed the case (Kod.App. 1b-2b) and was appealable at the time. In fact, the Petitioners had until May 24, 2003 to take the appeal to the Third Circuit, and instead rushed to modify the April 24, 2003 order, which they succeeded in doing on May 22, 2003, obviously in order to get a transfer in place prior to the expiration of the appeal period.

The sole case cited by Petitioners which appears to support appellate jurisdiction over an out-of-circuit transfer order is *American Fidelity Fire Insurance Co. v. USDC for the Northern Dis. of Cal*, 538 F.2d 1371 (9th Cir. 1976) (Petition, at 14). An examination of that ruling shows that the court's commentary arose as dicta in the consideration of a writ of mandamus directed to a transfer order entered by a district court within the Ninth Circuit, and cited only two supporting references, both mandamus cases involving requests for mandamus to prevent transfers from district courts within the respective appellate court's circuit. *Id.* at 1377 n.4. Though not mentioned by the Petitioners, the Ninth Circuit has since rejected the *American Fidelity*

logic, holding that that "[o]ur statement in footnote four was both overbroad and dicta". *Posnanski*, 421 F.3d at 979.

Thus, the cases cited by the Petitioners do not reflect a split in the circuits, but more importantly to this appeal address wholly different situations than the one faced by the Eleventh Circuit in this case. Since there is no split among the circuits as to the actual issue at hand, there is no compelling reason for this Court to grant the Writ of Certiorari based on the Eleventh Circuit's correct dismissal of Petitioners' improper attempt to appeal the ruling of the New Jersey Federal District Court dismissing and transferring the case to Florida.

II. THE PETITIONERS' ADMIT THAT THE TRANSFER OF THE NEW JERSEY ACTION TO FLORIDA ELIMINATED ANY INJUSTICE CAUSED BY THE FINDING THAT THE NEW JERSEY FEDERAL DISTRICT COURT LACKED PERSONAL JURISDICTION OVER THE DEFENDANTS.

In their reply brief to the New Jersey Federal District Court in support of their motion to transfer the dismissed case to the Florida Federal District Court, the Petitioners state that "granting [Petitioner's] relief from the Court's April 24, 2003 Order under Federal Rule of Civil Procedure 59(e) or 60(b) *will eliminate any injustice* caused by dismissing, for lack of personal jurisdiction, this otherwise timely action."[7]

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[7] Plaintiffs' Reply in Support of Their Motion, Pursuant to Fed.R.Civ.P. 59(e) and Fed.R.Civ.P. 60(b), for Relief from the Dismissal Order Entered on April 24, 2003, at pp. 3-4, NJ-00 Dkt.111 (emphasis added).

Since the New Jersey Federal District Court granted the transfer of the dismissed action from New Jersey to Florida, the New Jersey Federal District Court, by the Petitioners' own admission, eliminated any injustice caused by the decision entered by the New Jersey Federal District Court dismissing the claims for lack of personal jurisdiction for which the Petitioners failed to take an appeal to the Third Circuit at the time of the dismissal.

Moreover, the reason the Petitioners sought to have the dismissed New Jersey litigation transferred to Florida, rather than closed as originally done by the New Jersey Federal District Court (Kod.App. 1b-2b), was not for purposes of further litigating jurisdictional issues relating to New Jersey. Rather, the Petitioners sought to obtain the benefit of the April 24, 2000 filing date for their otherwise time-barred litigation pending in the Florida Federal District Court. Motion to Modify, at 4-5 ("If the Court exercises its power to transfer the complaint to the Southern District of Florida, the defendants will not be able to claim that the action filed in Florida is untimely."). As represented by Petitioners to the New Jersey Federal District Court, the transfer to Florida "will not change the substance of this Court's finding of lack of jurisdiction in New Jersey", but rather it will provide protection to the Petitioners if the defendants in Florida challenge the Florida complaint based on the statute of limitations. *Id.* at 7-8. The Petitioners' remained satisfied to litigate in Florida up until the day that the Florida Federal District Court ruled against them, as is shown by their decision not to move for re-transfer. However, once the adverse ruling was entered by the Florida Federal District Court, it was too late to change their minds and the issue was not

preserved for appeal.

Since the Petitioners obtained the transfer they requested from the New Jersey Federal District Court, there is no compelling reason for this Court to grant a Writ of Certiorari to address any issues relating to the decision by the New Jersey Federal District Court.

III. THE PETITIONERS CANNOT CLAIM ERROR REGARDING THE APPLICATION OF THE *ASAHI METAL* OPINION IN THIS CASE.

A. The Petitioners' Arguments Below Applied Justice O'Connor's Opinion To The Facts And Never Raised The Concurring Opinions Of Justices Brennan And Stevens.

Without mentioning to the New Jersey Federal District Court this Court's plurality opinion in *Asahi Metal Indus. Co., Ltd. v. Superior Court of Cal.*, 480 U.S. 102 (1987), the Petitioners argued that the defendants "engaged in additional conduct with the forum State of New Jersey beyond placing the product into the stream of commerce." Pet.App. 28a n.6. Since the Petitioners argued in favor of personal jurisdiction under the standard set forth by Justice O'Connor in the *Asahi Metal* plurality opinion, they cannot now argue that the application of that jurisdictional standard was incorrect.

On appeal to the Eleventh Circuit, the Petitioners presumed that the Third Circuit would adopt the standard set forth by Justice O'Connor in the *Asahi Metal* plurality opinion, once again never argued against the application of that standard, and cited

factual references in support of the jurisdictional analysis articulated in Justice O'Connor's plurality opinion in *Asahi Metal.*[5]

Now, for the first time, the Petitioners contend that "the view of stream of commerce set out in the two concurring opinions in *Asahi Metal* by Justices Brennan and Stevens should control." (Petition, at 17). Since "this argument was neither raised nor considered below" Kodiak submits that this Court should decline to consider this point. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 n.3 (1999). In other instances in which a party has failed to raise an argument below, this Court has declined to consider the point on appeal. *See, e.g., Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002); *TRW, Inc. v. Andrews*, 534 U.S. 19, 34 (2001); *Grupo Mexicano*, 527 U.S. at 318 n.3. Accordingly, since the Petitioners are presenting an issue that was not presented to any of the courts below, there is no compelling reason for this Court to grant a Writ of Certiorari on this point.

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[5] Petitioner's Brief to Eleventh Circuit, 11th Cir. Dkt. June 21, 2004, at 24.

B. Despite The Failure Of The Petitioners To Advocate In Favor Of The Concurring Opinions Of Justices Brennan And Stevens In The *Asahi Metal* Case, The New Jersey Federal District Court Opinion Found That Personal Jurisdiction Was Lacking Even Under The Concurring Opinions Of Justices Brennan And Stevens.

Since the New Jersey Federal District Court determined that the Petitioners lacked personal jurisdiction over the defendants under *both* Justice O'Connor's plurality opinion (Pet.App. 38a) as well as the concurring opinions of Justices Brennan and Stevens (Pet.App. 38a-39a n.10) there is no compelling reason for this Court to grant the Petition for Certiorari. Contrary to the assertion of the Petitioners in their Petition for Certiorari, the New Jersey Federal District Court did not apply only the plurality opinion of Justice O'Connor, but rather it applied all of the opinions in the *Asahi Metal* case.

The Third Circuit in *Pennzoil Prods. Co. v. Colelli & Assocs., Inc.*, 149 F.3d 197, 207 n.11 (3d Cir. 1998) (Petition, at 17), stated that "[t]he clear satisfaction of both the O'Connor and the Brennan standards obviates any need to adopt one over the other." Here, the failure of the Petitioners to establish jurisdiction in New Jersey under any of the three opinions in the *Asahi Metal* case, obviated both the need for the lower courts to select one standard over another and the need for this Court to grant certiorari to resolve the issue.

In any event, many of the circuit courts considering the proper analysis of personal jurisdiction

post-*Asahi Metal* have applied the type of standard articulated by Justice O'Connor in requiring a plaintiff to establish more than merely a stream of commerce to sustain personal jurisdiction over a defendant. *See, e.g., Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 451-52 (3d Cir. 2003) (requiring more than merely stream of commerce to sustain personal jurisdiction); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997) (same); *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 945-47 (4th Cir. 1994) (same), *cert. denied*, 513 U.S. 1151 (1995); *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 683 (1st Cir. 1992) (*Asahi Metal* did not change requirement in circuit that personal jurisdiction be based on more than merely stream of commerce); *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 375 (8th Cir. 1990) (requiring more than merely stream of commerce to sustain personal jurisdiction); *Madara v. Hall*, 916 F.2d 1510, 1519 (11th Cir. 1990) (applying Justice O'Connor's standard for personal jurisdiction).

Since the New Jersey Federal District Court utilized both standards to review the factual allegations of the Petitioners and many of the circuits to have addressed this issue, including both the Third Circuit and Eleventh Circuit, are in conformity with the application of the plurality opinion of Justice O'Connor, there is no compelling reason for this Court to grant a Writ of Certiorari to address the plurality opinion in *Asahi Metal*.

C. The Plurality Nature of the *Asahi Metal* Opinion Does Not Impact Upon The Dismissal Of The Petitioners' Florida Action Since That Dismissal Was Based On The Portion Of Justice O'Connor's Opinion In Which All Justices Concurred.

As to the failure of Petitioners to establish jurisdiction over the defendants in Florida, this portion of the *Asahi Metal* opinion is not at issue in reviewing the decisions of the Florida Federal District Court or the Eleventh Circuit. Both of those decisions were based on the failure of the Petitioners to establish that the traditional notions of fair play and substantial justice are satisfied. Specifically, the Eleventh Circuit opinion stated that "even if . . . the Florida long-arm statute conferred jurisdiction, we agree with the district court that the exercise of jurisdiction would offend traditional notions of fair play and substantial justice." (Pet.App. 7a-8a).

Accordingly, there is no compelling reason for this Court to grant a Writ of Certiorari to examine this aspect of the *Asahi Metal* decision.

IV. THERE IS NO BASIS FOR THIS COURT TO REVIEW THE APPLICATION OF A TWO-PART JURISDICTIONAL TEST TO CLAIMS OF GENERAL PERSONAL JURISDICTION.

A. The Eleventh Circuit's Opinion Was Based On The Failure Of Petitioners To Establish Jurisdiction Under the Florida Long Arm Statute And Whether Asserting Personal Jurisdiction Would Offend Traditional Notions Of Fair Play And Substantial Justice Was Merely An Additional Point Of Consideration.

A review by this Court of whether a jurisdictional analysis should include consideration of the factors of fair play and substantial justice would not affect the outcome of the personal jurisdiction dispute between the parties in this action. The Eleventh Circuit determined that the Petitioners failed to prove the first prong of the jurisdictional analysis, namely whether the Petitioners established "specific jurisdiction" pursuant to the Florida long-arm statute (Fla. Stat. § 48.193(1)(a)) or "general jurisdiction" pursuant to the Florida long-arm statute (Fla. Stat. § 48.193(2)). Pet.App. 5a-7a. Having determined that the Petitioners failed to establish the first prong of the jurisdictional test, there was no need for the Eleventh Circuit to consider any further jurisdictional analysis. Since any finding by this Court regarding the propriety of examining "traditional notions of fair play and substantial justice" in the context of a general jurisdiction analysis would have no effect on the result in this case, there is no compelling reason for this Court to grant a Writ of Certiorari to address this issue.

B. Constitutional Due Process Requirements Must Apply To The Analysis Of General Jurisdiction.

There is no compelling reason for this Court to address the application by the Eleventh Circuit of a two-part jurisdictional analysis in general jurisdiction cases. Whether addressed as part of a statutory analysis or independently, Due Process considerations are part of every jurisdictional analysis. Respondents have reviewed many decisions in which courts specifically recognize that a general jurisdiction analysis includes determining whether asserting personal jurisdiction in the forum state would be reasonable, such that it does not offend traditional notions of fair play and substantial justice. *See, e.g., Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980); *Harlow v. Children's Hospital*, 432 F.3d 50, 57-58 (1st Cir. 2005); *Intera Corp. v. Henderson*, 428 F.3d 605, 615-16 (6th Cir. 2005); *Horizon Aggressive Growth, L.P. v. Rothstein-Kass, P.A.*, 421 F.3d 1162, 1166-67 (11th Cir. 2005); *Dever v. Hentzen Coatings, Inc.*, 380 F.3d 1070, 1073-74 (8th Cir. 2004), *cert. denied*, 125 S.Ct. 1304 (2005); *Freudensprung v. Offshore Tech. Svcs., Inc.*, 379 F.3d 327, 343 (5th Cir. 2004).

As clearly articulated in a portion of Justice O'Connor's opinion in *Asahi Metal* joined by all Justices, "[t]he strictures of the Due Process Clause forbid a state court to exercise personal jurisdiction over Asahi under circumstances that would offend "'traditional notions of fair play and substantial justice.'" *Asahi Metal*, 480 U.S. at 113 (citation omitted). The constitutional mandates of the Due Process clause must be complied with by all parties seeking to assert personal jurisdiction over a party.

In *Burnham v. Superior Court of California*, 495 U.S. 604 (1990), this Court reiterated the settled principle that "[i]n what has become the classic expression of the criterion, we said in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), that a state court's assertion of personal jurisdiction satisfies the Due Process Clause if it does not violate '"traditional notions of fair play and substantial justice."'" *Burnham*, 495 U.S. at 609 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

Some court opinions have condensed the factual analysis under a long arm statute with the due process analysis, especially in instances in which the conduct of the defendant satisfies both statutory and constitutional requirements for personal jurisdiction. *See, e.g., AutoNation, Inc. v. Whitlock*, 276 F.Supp.2d 1258, 1262 (S.D. Fla. 2003); *Nichols v. Paulucci*, 652 So.2d 389, 391 (Fla. 5th DCA), *rev. denied*, 659 So.2d 1088 (Fla. 1995), *cert. denied*, 516 U.S. 1046 (1996). However, this does not eliminate the requirement that the court examine Due Process requirements in determining whether a defendant is subject to personal jurisdiction. *See Burnham*, 495 U.S. at 609.

Accordingly, there is no compelling reason for this Court to grant a Writ of Certiorari to address the personal jurisdiction analysis performed by the Eleventh Circuit since it comports with the Due Process analysis established by the Constitution and followed by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,
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1b

Filed 4/24/2003

Civ. No. 00-1938 (GEB)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

THEODORE KOZIOL and LOIS KOZIOL,
Plaintiffs,

v.

BOMBARDIER-ROTAX GmbH MOTORENFABRIK; BOMBADIER INC., KODIAK RESEARCH LTD.; and ROTECH RESEARCH CANADA LTD., a/k/a KODIAK RESEARCH CANADA, LTD.
Defendants.

ORDER

This matter comes before the Court upon the motions to dismiss by defendants, Bombardier-Rotax Gmbh Motorenfabrik; Bombadier Inc., Kodiak Research Ltd.; and Rotech Research Canada Ltd, a.k.a. Kodiak Research Canada, Ltd. on plaintiffs' complaint; and the Court having considered the parties' submissions; and having heard oral argument on March 3, 2003; and for the reasons stated in the Memorandum Opinion accompanying this order;

IT IS this 23rd day of April, 2003

ORDERED that defendants' motions to dismiss are GRANTED; and it is further
ORDERED that the clerk should mark this case

CLOSED.

s/
GARRETT E. BROWN, JR., U.S.D.J.

No. 05-633

In The Supreme Court of the United States

THEODORE KOZIOL and LOIS KOZIOL,

Petitioners,

vs.

BOMBARDIER-ROTAX GmbH MOTORENFABRIK; KODIAK RESEARCH, LTD.; ROTECH RESEARCH CANADA LTD., a/k/a KODIAK RESEARCH CANADA, LTD.; AERO DISTRIBUTION LIMITED; AERO DISTRIBUTION INTERNATIONAL LIMITED; and PASCAL RONVEAUX,

Respondents.

On Petition For Writ of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT BOMBARDIER-ROTAX GmbH MOTORENFABRIK'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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February 17, 2006

QUESTIONS PRESENTED

Respondent submits the following questions more accurately reflect the issues to be decided by the Court in determining whether to grant the Petition for Certiorari.

1. Whether there is a conflict among the circuits regarding a circuit court's appellate jurisdiction to review an immediately appealable pre-transfer order by a transferor district court located outside the circuit?

2. Whether this case is an appropriate vehicle for review of *Asahi Metal's* stream of commerce analyses?

3. Whether the Eleventh Circuit adhered to this Court's well-settled precedent in concluding the Florida District Court lacked personal jurisdiction over Respondent?

LIST OF ALL PARTIES IN COURT BELOW

Petitioners correctly identify the parties in the court below. Pet. at iii.

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STATEMENT OF THE CASE

Petitioners' procedural history of the case and statement of opinions below are largely correct, except Petitioners misstate the date of the New Jersey District Court's order dismissing the Complaint for lack of personal jurisdiction. Petitioners state this opinion was entered on April 24, 2004. The correct date, however of this opinion is April 24, 2003. Pet. App. 20a. Although Petitioners' history of the case is largely correct in what it does say, it omits important points. Consequently, rather than restate the entire case history, Respondent Bombardier-Rotax GMBH Motorenfabrik ("Respondent") will focus on Petitioners' omissions.

On March 20, 1999, an ultra-light aircraft containing an engine manufactured by Respondent, in which Petitioner Theodore Koziol was a passenger, crashed in New Jersey. Petitioners, residents of New Jersey, filed a products liability action against Respondent and some of its distributors in the United States District Court for the District of New Jersey based on diversity of citizenship. Pet. at 3.

Respondent is an Austrian corporation with its principal place of business in Gunskirchen, Austria. Pet. App. 53a. It manufactures ultra-light engines in Austria and sells some of its engines to Kodiak Research Ltd. ("Kodiak"), a Bahamian corporation with its principal place of business in the Bahamas. Pet. App. 55a - 56a. Kodiak distributes some of Respondent's engines pursuant to an international distribution agreement that permits but does not require Kodiak to distribute Respondent's engines in the territories of North and South America, which may include the United States, Brazil, Chile, Argentina and Colombia. Pet. App. 44a - 45a, 55a - 56a. In the instant case, Respondent sold the subject engine to Kodiak pursuant to the international distribution agreement. Pet. App. 65a. As in all cases where Kodiak purchases engines from it,

Respondent sold and transferred title to the subject engine to Kodiak in Austria. Pet. App. 55a - 56a.

After Petitioners filed suit in the New Jersey District Court, all defendants moved to dismiss the complaint for lack of personal jurisdiction. Before the New Jersey District Court ruled on Respondent's motion to dismiss, Petitioners filed another complaint (a "saving action") against Respondent in the Southern District of Florida. On April 24, 2003, the New Jersey District Court granted all defendants' motions to dismiss for lack of personal jurisdiction, finding all defendants lacked minimum contacts with New Jersey. Pet. App. 20a - 39a. The April 24, 2003 order dismissing the Complaint states it is "ORDERED that defendants' motions to dismiss are GRANTED; and it is further ORDERED that the clerk should mark this case CLOSED." Resp. App. 16a - 17a.

In its April 24, 2003 opinion supporting its dismissal of the Complaint for lack of personal jurisdiction, the New Jersey Court, adopting the steam of commerce view stated in Justice O'Connor's plurality opinion in *Asahi Metal Industry Co., Ltd. v. Superior Court of Calif., Solano Co.*, 480 U.S. 102 (1987), held all defendants lacked minimum contacts with the state of New Jersey. The New Jersey Court found that Respondent's mere knowledge that the stream of commerce may sweep its engines into New Jersey, absent other additional conduct showing purposeful availment, was insufficient to establish minimum contacts consistent with Due Process. Pet. App. 29a - 30a.

Notably absent from the Petition is any explanation of the reasons why the New Jersey Court adopted Justice O'Connor's view of stream of commerce over the views of the other plurality opinions in reaching its decision that Respondent lacked minimum contacts with New Jersey. Such an explanation is essential to a full understanding of the

New Jersey District Court's decision finding a lack of personal jurisdiction over the foreign defendants in this case.

In explaining, in footnote 6 of its April 24, 2003 opinion, why it adopted Justice O'Connor's stream of commerce view, the New Jersey District Court expressly considered the opinions that Justice Brennan and Justice Stevens authored in *Asahi Metal*:

> There are two other standards based on the stream of commerce theory found in *Asahi* . . . Justice Brennan opined that additional conduct in the forum state did not have to be shown . . . [because] awareness that the final product is being marketed in the forum state is sufficient . . . [however] Justice Brennan determined that jurisdiction was not appropriate over Asahi because it would not comport with 'fair play and substantial justice' . . . Justice Stevens . . . [concluded] that additional conduct with the forum state was not necessary to the Court's determination . . . [but held] jurisdiction over Asahi cannot be exercised because it would be 'unreasonable and unfair.'
>
> Pet. App. 28a.

After considering the differing views of stream of commerce set forth in *Asahi Metal*, the New Jersey Court explained the Third Circuit had not yet adopted any one approach from *Asahi Metal.* Pet. App. 28a. Significantly, the New Jersey Court decided to adopt Justice O'Connor's stream of commerce view in this case because *Petitioners* themselves had argued throughout the case that the defendants engaged in "additional conduct" in New Jersey sufficient to establish minimum contacts. Footnote 6 of the New Jersey Court's opinion further states:

> *There is no mention of Asahi in plaintiffs' opposition papers*, however plaintiffs did assert that defendants engaged in additional conduct with the forum State of New Jersey beyond placing the product into the stream of commerce. Plaintiffs' Brief at 9-16. In addition, at oral argument, plaintiffs maintained that defendants all engaged in additional conduct with the forum State of New Jersey such that personal jurisdiction over them is proper . . . .; *Because plaintiffs have argued that additional conduct in the forum State was present, this Court will analyze the instant case under Justice O'Connor's approach.*

Pet. App. 28a (emphasis added).

Finally, although the New Jersey Court never had to reach the issue of whether exercising jurisdiction over the defendants was reasonable, the court still applied the reasonableness factors in *Asahi Metal* to the facts of this case. The New Jersey Court made clear that its finding a lack of personal jurisdiction would not change under a different view of stream of commerce because asserting jurisdiction would be unreasonable. In footnote 10 the court emphasized:

> Because this Court has found that defendants did not purposefully direct their actions to . . . New Jersey . . . there is no need for the Court to address whether exercising personal jurisdiction over defendants would offend traditional notions of fair play and substantial justice. However, the Court notes that each defendant is a foreign corporation with their

> *principal places of business, as well as their* employees and documents, in Austria, the Bahamas, and Canada. 'The unique burdens placed up an [sic] one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.' *Asahi*, 480 U.S. at 114. In addition, this Court has serious doubts as to any burden on plaintiffs to litigate this case outside of the forum State of New Jersey because on December 30, 2002, plaintiffs filed a lawsuit against these parties seeking the same relief in the Southern District of Florida. Therefore, *even under Justice Brennan's and Justice Steven's analysis from Asahi, this Court still does not have personal jurisdiction over defendants.*

Pet. App. 38a - 39a (emphasis added).

On May 5, 2003, rather than appealing the New Jersey District Court's April 24, 2003 substantive order dismissing the Complaint for lack of personal jurisdiction to the Third Circuit Court of Appeals, Petitioners instead chose to submit to the New Jersey District a motion requesting modification of the April 24, 2003 order to transfer the case to Florida. Specifically, Petitioners requested the court transfer the action to the Southern District of Florida pursuant to 28 U.S.C. § 1404(a), 28 U.S.C. § 1406(a) and/or 28 U.S.C. § 1631. Resp. App. 6a.

In their memorandum of law supporting their motion for relief from the New Jersey Court's April 24, 2003 dismissal order Petitioners requested the case be transferred to avoid their being prevented from invoking the jurisdiction of the Florida District Court by the statute of limitations.

Resp. App. 5a - 6a. It bears mentioning that nowhere in their motion or supporting memorandum of law did Petitioners ever raise any objection to or otherwise contest the New Jersey District Court's substantive finding that it lacked personal jurisdiction over Respondent. To the contrary, Petitioners stated:

> This motion is filed *solely* as a matter of prudence to forestall the possibility of a claim by the defendants in an identical action filed in Florida that the complaint is barred by the statute of limitations in Florida. The modest relief the plaintiffs seek in this motion *does not change the substance of the Court's ruling that personal jurisdiction over the defendants is not proper in New Jersey . . . [t]his relief, if granted, preserves the essence of the Court's ruling on lack of jurisdiction in New Jersey.*
>
> Resp. App. 5a - 6a (emphasis added).

On May 22, 2003, the New Jersey District Court entered an order modifying its April 24, 2003 order of dismissal by transferring the complaint to the District Court for the Southern District of Florida. Pet. App. 18a - 19a. After the transfer on August 18, 2003, the Southern District of Florida consolidated the newly transferred New Jersey action with the "saving action." In Florida, all defendants again filed motions to dismiss for lack of personal jurisdiction. On March 22, 2004, the Florida District Court granted all defendants' motions and dismissed the case with prejudice.

Petitioners then filed their appeal to the Eleventh Circuit Court of Appeals. There Petitioners sought review of both the New Jersey Court's April 24, 2003 order dismissing the Complaint and the May 22, 2003 order of modification and transfer to the Florida court. Petitioners also sought

review of the Southern District of Florida's order dismissing the Complaint with prejudice for lack of personal jurisdiction. After Respondent filed a motion for partial dismissal of the portion of the appeal seeking review of the orders entered by the New Jersey District Court, the Eleventh Circuit dismissed this portion of the appeal on the grounds it lacked appellate jurisdiction over the orders entered by a district court located in another regional circuit. Pet. App. 15a - 16a. As to Petitioners' appeal of the Florida District Court's dismissal for lack of personal jurisdiction, the Eleventh Circuit, reviewing the dismissal order *de novo* and affirming, found a lack of general personal jurisdiction over all defendants in Florida. In its decision dated April 22, 2005, the Eleventh Circuit focused on the attenuated nature of the contacts that Respondent had with Florida:

> No exercise of jurisdiction, be it general or specific, may offend 'traditional notions of fair play and substantial justice.' *International Shoe Co. v. Washington*, 66 S. Ct. 154, 158 (1945) . . . [e]ven if – as the [Florida] district court assumed without deciding – the Florida long-arm statute conferred (general) jurisdiction . . . the exercise of jurisdiction would offend traditional notions of fair play and substantial justice . . . [t]he only contact the subject engine had with Florida is that a Florida corporation received shipment of the engine in Florida for delivery to a Mississippi corporation who then delivered the engine to a New Jersey purchaser. The contact of these international Defendants with Florida in terms of *this engine* is even more removed.
>
> Pet. App. 8a.

As to Petitioners' attempt to seek review of the New Jersey District Court's April 24, 2003 order of dismissal, the Eleventh Circuit noted in its opinion that *"[i]nstead of appealing the [New Jersey Court's] dismissal order*, Plaintiffs moved to reopen the New Jersey action and to have the action transferred to the Southern District of Florida." Pet. App. 4a (emphasis added). Thus, the Eleventh Circuit expressly recognized Petitioners could have directly appealed the New Jersey Court's order of dismissal to the Third Circuit, but chose not to and instead asked that the case be transferred.

REASONS FOR DENYING THE WRIT

The Petition for Certiorari should be denied because it satisfies none of the criteria for certiorari review in this Court. Rather than present genuinely certiorari worthy questions, the Petition is a poorly disguised attempt to have this Court overturn the underlying decisions of the New Jersey District Court and the Eleventh Circuit Court of Appeals dismissing Petitioners' Complaints for lack of personal jurisdiction. Petitioners initially chose to file suit in New Jersey's District Court. When that court dismissed their Complaint for lack of personal jurisdiction, Petitioners, as the Eleventh Circuit noted, could have appealed that court's dismissal order to the Third Circuit Court of Appeals. However, they simply chose not to, instead preferring to request that the case be transferred. Standing alone, the New Jersey District's dismissal order was immediately appealable because: 1) it dismissed the Complaint against all defendants, leaving no issues for the New Jersey Court to decide, 2) it was not coupled with a transfer order, and 3) it specified that the case was "closed." Despite the fact that the order was immediately appealable, Petitioners chose to file a motion to modify the order and transfer the case to Florida.

These facts demonstrate the conflict amongst the circuits that Petitioners primarily urge warrants this Court's review is illusory. The cases Petitioners cite as being in conflict all involved pre-transfer interlocutory orders that were not immediately appealable in the transferor circuit. This case, however, does not present that question because the New Jersey Court's order of dismissal was immediately appealable. This Court cannot accept a case to review a question that the case, because of its facts, does not frame.

Additionally, in an attempt to find a jurisdictional hook to support this Court's review of the merits of the decisions below with which they are unhappy, Petitioners allege a conflict in the federal circuits regarding application of Justice O'Connor's stream of commerce view in *Asahi Metal*. However, because both the New Jersey District and the Eleventh Circuit concluded that jurisdiction over this Austrian Respondent would be unreasonable, even if it had minimum contacts with the forum state, resolution of the so-called conflict would not make a difference in this case. If the Court is inclined to address the divergent stream of commerce theories set forth in *Asahi Metal*, it ought to do so in a case in which such effort would actually affect the result.

Petitioners also allege a circuit split as to whether *Asahi Metal*'s application of the Due Process reasonableness factors can be applied to general personal jurisdiction cases. But, in concluding jurisdiction over Respondent in Florida would be unreasonable, the Eleventh Circuit considered factors this Court approved more than thirty years ago. Accordingly, in the absence of any circuit split on the issue, and in light of this Court's settled precedent, there is nothing compelling about this case that warrants the attention of the Court.

I. There Is No Conflict In The Circuits On The Question Presented By This Case: Whether A Circuit Court May Review An Immediately Appealable Pre-Transfer Order Of A Transferor District Court Located Outside The Circuit.

The circuit conflict Petitioners claim exists regarding appellate review of pre-transfer rulings of a transferor district court located outside the reviewing court's circuit is entirely illusory and thus insufficient to merit certiorari review. There is no circuit split on the specific legal question presented by this case, which arises from the Eleventh Circuit's refusal to review a pre-transfer, *immediately appealable* order of a district court outside the Eleventh Circuit. Even if this Court finds any disagreement among the federal courts regarding reviewability of pre-transfer *interlocutory* orders issued by out-of-circuit district courts, resolution of that conflict will not change the result in this case.

While Petitioners initially appealed both orders entered by the New Jersey Court to the Eleventh Circuit, the Petition alleges a circuit conflict exists only with regards to an out-of-circuit district court's "*pre-transfer*" rulings. By its very terms, the Petition limits the relevant inquiry in this case only to the New Jersey Court's April 24, 2003, pre-transfer dismissal order - which was immediately appealable - and excludes the subsequent and separate May 22, 2003 interlocutory order transferring the case to Florida.

In presenting the purported circuit split to the Court, Petitioners fail to distinguish between interlocutory and immediately appealable orders, and thus misstate the question this case actually presents. Such a distinction is essential however. Because the April 24, 2003 pre-transfer dismissal order was immediately appealable and not a transfer or interlocutory order, the only issue for the Court to decide is whether there is a conflict among the circuits as to

whether a circuit court may review a pre-transfer, *immediately appealable* order issued by an out-of-circuit transferor district court. The disagreement among the circuits cited in the cases relied on by Petitioners focuses solely on *interlocutory* orders that are *not* immediately appealable. But, that disagreement among the circuits is not a question that this case could possibly raise.

Generally, courts of appeal have jurisdiction over appeals from all "final decisions" of the district courts. 28 U.S.C. § 1291 (1988). Petitioners correctly note that interlocutory decisions are not final or immediately appealable orders. Certain interlocutory orders, however, are immediately appealable, including: 1) limited types of interlocutory decisions specified under 28 U.S.C. § 1292(a) (1988), 2) decisions certified for immediate appeal by the district court and accepted by the circuit court under 28 U.S.C. § 1292(b) (1988), 3) decisions subject to immediate mandamus review under 28 U.S.C. § 1651 (1988), and 4) interlocutory decisions that meet the "collateral order" exception of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). Congress specifically prescribed geographical limitations on where appeals from federal district courts must be taken in 28 U.S.C. § 1294(1) (1988), which provides: "appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows: (1) From a district court of the United States to the court of appeals for the circuit *embracing the district*." 28 U.S.C. § 1294(1) (1988) (emphasis added). *See also TechnoSteel, LLC v. Beers Constr. Co.*, 271 F.3d 151, 154-155 (4th Cir. 2001) (stating § 1294(1) mandates all "reviewable decisions" be reviewed only by circuit court for circuit embracing district court issuing the decision).

The New Jersey District Court's April 24, 2003 order of dismissal was an "immediately appealable order" that could have been appealed to the Third Circuit after it was entered. This Court has held a district court decision is

immediately appealable under § 1291 if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978). In *In re Grand Jury Proceedings*, 827 F.2d 868, 871 (2d Cir. 1987), the Second Circuit identified several factors to be considered in deciding whether a court's decision is considered final for purposes of appealability. These factors include "whether the appeal might subsequently be rendered moot, whether there is a possibility of self-correction by the judge whose decision is on appeal, whether hearing the appeal risks interrupting an ongoing proceeding, and whether alternatives to immediate review exist."

Although *In re Grand Jury Proceedings* did not deal with an order of dismissal for lack of personal jurisdiction, the court's analysis is instructive in this case as it distinguishes the cases cited by Petitioners and adopts the holding of the Eleventh Circuit in *Roofing & Sheet Metal Services v. LaQuinta Motor Inns*, 689 F.2d 982 (11th Cir. 1982), which the court below relied upon. The Second Circuit held in *In re Grand Jury Proceedings* that a portion of a district court's modifying order conditioning use of grand jury materials on a showing of particularized need was immediately appealable, noting:

> [t]he ruling . . . *has* ended the litigation in Judge McLaughlin's court . . . [because it] 'leaves nothing' more for Judge McLaughlin to do [in this court because] . . . [t]here is no possibility of self-correction by Judge McLaughlin . . .; A final factor also favors an immediate appeal. Neither the tax court nor the Eleventh Circuit would have jurisdiction to review Judge McLaughlin's ruling . . . "[i]t bears emphasis that, as the language of § 1294(1) establishes, the provision applies to all 'reviewable'

> decisions of the district courts, not only those that are immediately appealable." *Roofing & Sheet Metal Services v. LaQuinta Motor Inns*, 689 F.2d 982, 986 n.5 (11th Cir. 1982). The Eleventh Circuit, therefore, would not have jurisdiction to review Judge McLaughlin's order, emanating from a district court not "embrac[ed]" by that Circuit, as a final decision.

Id. at 871.

Standing alone, a dismissal order for lack of personal jurisdiction is final and appealable. *Wade v. Farmers Ins. Group*, 1996 U.S. App. LEXIS 23393, *10 (7th Cir. 1996); *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 944 (7th Cir. 1992). Several circuits have distinguished immediately appealable orders dismissing a case for lack of personal jurisdiction from "combination" orders, where dismissal orders are coupled with an order transferring the case to another court. *See FDIC v. McGlamery*, 74 F.3d 218 (10th Cir. 1996) (finding lack of federal appellate jurisdiction in transferee circuit where court dismissed claims for lack of personal jurisdiction and ordered transfer of claims to federal court in another district); *Chapple v. Levinsky*, 961 F.2d 372 (2d Cir. 1992) (finding no appellate jurisdiction in transferor circuit over district court's interlocutory order dismissing complaint against three defendants for lack of personal jurisdiction and transferring the action against the fourth to another circuit's district court); *Carteret Sav. Bank, FA v. Shushan*, 919 F.2d 225, 229 (3d Cir. 1990) (finding appellate jurisdiction was not sustainable by severing transfer order predicated on lack of personal jurisdiction from the dismissal order, which, "*standing alone*, was final") (emphasis added).

Here, the New Jersey Court's April 24, 2003 order of dismissal was not coupled with a transfer order. And, it dismissed the case against all defendants, leaving nothing

more for that court to decide. Therefore, it was an immediately appealable order which qualifies as a "reviewable decision" under 28 U.S.C. § 1294(1). A majority of federal courts have held that immediately appealable orders, like the April 24, 2003 dismissal order, are not reviewable by a transferee circuit court if the transferor district court that issued the order is outside the transferee circuit.[1]

The Fourth Circuit's decision in *Harding v. Williams Prop. Co.*, 1998 U.S. App. LEXIS 21269, *2 (4th Cir. 1998) is especially instructive since it involved facts similar to those presented here. There, the defendants filed motions to dismiss for lack of personal jurisdiction, and the transferor district court, located in the Fifth Circuit, dismissed the complaint, finding a lack of minimum contacts with Texas.

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[1] *See e.g.*, Eleventh Circuit: *Roofing & Sheet Metal Servs.*, 689 F.2d at 986 (holding the term "reviewable decisions" in § 1294(1) "applies to all reviewable decisions of the district courts, not just to those which are immediately appealable, and emphasizing "Congress has not given us jurisdiction to review decisions of district courts outside this Circuit"); Tenth Circuit: *McGeorge v. Continental Airlines, Inc.*, 871 F.2d 952, 954 (10th Cir. 1989) (holding "the unequivocal language of [§ 1294(1)] leaves no room for doubt that we do not have jurisdiction over "an appeal from the transferor district court's decision"); D.C. Circuit: *Hill v. Henderson*, 195 F.3d 671, 675-677 (D.C. Cir. 1999) (refusing to exercise jurisdiction over its district court's interlocutory dismissal of only one count of plaintiff's claim after case was transferred to district court outside circuit because dismissal not immediately appealable since it dismissed less than all claims; holding "reviewable decisions" under § 1294(1), are limited to those issued by transferor district court that are "subject to review at the time they are entered," and may only be appealed to the circuit court embracing the transferor district court, whereas all other pretransfer, interlocutory decisions "shift" or "flow" to the transferee circuit where they become appealable upon final judgment there); Seventh Circuit: *Jones v. Infocure Corp.*, 310 F.3d 529 (7th Cir. 2002) ([t]he appropriate court of appeals to hear appeals when venue has been transferred from one district to another turns on whether the order entered by the transferor court prior to transfer qualifies for immediate appeal . . . [if it does] any appeal must be taken to court of appeals covering transferor district").

Subsequently, the plaintiff filed a motion to transfer the case under § 1406. The court granted plaintiff's motion and transferred the case to a district court in the Fourth Circuit. *Id.* at *3-4. When plaintiff appealed the transferor court's order of dismissal, the Fourth Circuit held it lacked jurisdiction to review the order: "[w]e have interpreted § 1294(1) to prohibit review of pre-transfer decisions by district courts outside this circuit." *Id.* at *8. The Court supported its decision with analysis equally applicable at bar:

> [plaintiff] could have appealed this final judgment to the Court of Appeals for the Fifth Circuit. Instead, she moved for reconsideration [and] did not ask the district court to rethink its ruling and reinstate the case to that court's docket; rather, she requested that, "in the interest of justice," the court transfer the case under 28 U.S.C. § 1406(a) to a district in which personal jurisdiction was present . . . *the transfer was the desired result of Harding's own motion* . . . [h]er case had been dismissed for lack of personal jurisdiction. She could have fought the ruling or reckoned with the effect of it, and she chose the latter. *Having deliberately forgone the opportunities for reconsideration or review of the personal jurisdiction issue in the Texas district court and in the Court of Appeals for the Fifth Circuit*, she could scarcely have expected the transferee district court to revisit it.

Id. at *8-10.

The decisions Petitioners rely upon are different from this case because the holdings of those cases strictly apply to interlocutory transfer orders which are not immediately appealable. In contrast, the Eleventh Circuit's decision in

Roofing & Sheet Metal Services v. LaQuinta Motor Inns, which the court below relied upon here, is directly applicable to "*all* reviewable decisions of district courts" whether the decision is interlocutory or immediately appealable.

In addition to the fact that the circuit conflict Petitioners advance does not apply to this case because this case involves an immediately appealable order, the cases Petitioners cite to support the proposition are really not in conflict. Petitioners rely on decisions from the Second, Fifth, Sixth and Ninth Circuits, claiming these circuits have adopted the view stated in *Asarte Shipping Co. v. Allied Steel & Export Svc.*, 767 F.2d 86 (5th Cir. 1985) and *Magnetic Eng'g & Mfg. Co. v. Dings Mfg. Co.*, 178 F.2d 866 (2d Cir. 1950), that "all pre-transfer rulings" of transferor district courts are appealable to the circuit court in the transferee circuit. Further, Petitioners cite to footnote 4 of *American Fidelity Fire Ins. Co. v. United States District Court*, 538 F.2d 1371, 1376-77 (9th Cir. 1976) as stating the rule it asks this Court to adopt.

A more recent decision from the Ninth Circuit, however, demonstrates even the circuit conflict Petitioners (erroneously) assert arises from this case does not warrant certiorari review. In *Posnanski v. Gibney*, 421 F.3d 977, 979 (9th Cir. 2005), the Ninth Circuit held "[i]f a transfer is made from a district court in one circuit to a district court in another circuit, the court of appeals in the latter circuit cannot directly review the action of the first district court in ordering transfer . . . [because] such transfer orders are reviewable only in the circuit of the transferor district court." *Id.* at 980. Directly opposite of Petitioners' representation of that court's position, the Ninth Circuit held: "[w]e join our sister circuits and hold that we may not review a transfer . . . by a district court outside of our circuit to a district court within our circuit. If Posnanski disagreed with the transfer from the Western District of Wisconsin to the District of Arizona, he should have sought review, by whatever means

were available to him, in the Seventh Circuit . . . [h]is remedy lies in the circuit of the transferor court, not the circuit of the transferee court." *Id.*

Specifically, the *Posnanski* Court noted it's "sister circuits," including the First, Fourth, Sixth, Seventh, Eighth, Eleventh and D.C. Circuits, have "all held that a transferee circuit does not have jurisdiction to review a transfer order by a transferor court in another circuit." *Id.* at 979.[2] And

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[2] *See United States v. Copley*, 25 F.3d 660, 662 (8th Cir. 1994) ("We lack jurisdiction to consider . . . [the] North Carolina district court's decision to transfer this case to the Missouri district court . . . [but can consider the] . . . motion to retransfer"); *Brock v. Entre Computer Ctrs., Inc.*, 933 F.2d 1253, 1257 (4th Cir. 1991) ("This court has held that we have no jurisdiction to review a decision to transfer venue rendered by a district court in another circuit"); *Lewelling v. Farmers Ins. of Columbus, Inc.*, 879 F.2d 212, 218 (6th Cir. 1989) ("California district court's order transferring this case to the Southern District of Ohio is not reviewable by this court."); *Reyes v. Supervisor of DEA*, 834 F.2d 1093, 1095 (1st Cir. 1987) ("There is substantial authority to conclude that we are precluded from reviewing an order by a district court in another circuit"); *Roofing & Sheet Metal Servs. Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 986, 989 (11th Cir. 1982) (dismissing appeal of transfer order entered by transferor district court outside Eleventh Circuit for lack of appellate jurisdiction and holding "[c]ongress has not given us jurisdiction to review *decisions* of district courts outside this Circuit"); *Linnell v. Sloan*, 636 F.2d 65, 67 (4th Cir. 1980) ("Under the prevailing view among the circuits, [plaintiffs] should have moved for retransfer of their action in the Eastern District of Virginia, the transferee district court, in order to vest us with jurisdiction to pass on their contention"); *Starnes v. McGuire*, 168 U.S. App. D.C. 4, 512 F.2d 918, 924 (D.C. Cir. 1974) (en banc) ("it is well established that a transferee court cannot directly review the transfer order [from an out-of-circuit district court] itself"); *Illinois Tool Works, Inc. v. Sweetheart Plastics, Inc.*, 436 F.2d 1180, 1188 (7th Cir. 1971) ("Defendants argue that transfer of their earlier filed declaratory judgment action from the United States District Court for the Southern District of New York was improper. If it was, defendants should have raised that issue in the Second Circuit, not here."); *Purex Corp. v. St. Louis Nat'l Stockyards Co.*, 374 F.2d 998, 1000 (7th Cir. 1967) ([as to the portion of the complaint] . . . directed against the action of the transferor court which sits in the [8th Circuit], and as . . . plaintiffs [failed to make] in the

the court explained that footnote 4 of its prior decision in *American Fidelity Fire Insurance Co. v. United States District Court*, 538 F.2d 1371 (9th Cir. 1976), which Petitioners rely upon, was uncontrolling dicta:

> we have never addressed whether an out-of-circuit district court's decision to transfer a case to a district court within our circuit is appealable to our circuit, although there is some language suggesting that we can. The confusion stems from our decision in *American Fidelity Fire Insurance Co. v. United States District Court*, 538 F.2d 1371 (9th Cir. 1976). In that case . . . [a]lthough we were dealing with an order from a transferor district court within our circuit, rather than from one outside our circuit, and were holding that mandamus would *not* be granted, we added in a footnote that "on appeal from a final judgment we may exercise our appellate jurisdiction to review a district court's transfer order, *even if the transferor court is not within our circuit*." We cited two cases in support of this proposition. In the first case, *Gulf Research & Dev. Co. v. Harrison*, 185 F.2d 457, 458-59 (9th Cir. 1950) . . . [i]n the second case, *Magnetic Eng'g & Mfg. Co. v. Dings Mfg. Co.*, 178 F.2d 866, 869 (2d Cir. 1950), the Second Circuit discussed whether it could review an appeal of a transfer [involving a transferor and transferee court] . . . within

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[Illinois] transferee court . . . any motion to retransfer the case to St. Louis, we have no jurisdiction to act extra-territorially in order to adjudicate the question now raised by plaintiff."); *Preston Corp. v. Raese*, 335 F.2d 827, 828 (4th Cir. 1964) ("[t]he rule is well established that a transfer order is not appealable").

> the reviewing circuit. Thus, neither of the cases relied upon by *American Fidelity* actually dealt with a "transferor court . . . not within our circuit," 538 F.2d at 1377 n.4, nor did *American Fidelity* itself deal with a review of a transfer order from such a court. *Our statement in footnote four was both over-broad and dicta.*

Id. at 979-980 (emphasis added). *See also United States v. French*, 787 F.2d 1381, 1383 n.3 (9th Cir. 1986) (emphasis added) ("[w]e need not address *the dicta* that a civil transfer order is reviewable by the circuit court for the transferee").

In addition to conclusively confirming footnote 4 of *American Fidelity* was mere dicta, the Ninth Circuit's decision in *Posnanski* also shows that *Magnetic Eng'g & Mfg. Co. v. Dings Mfg. Co.*, another case upon which Petitioners rely, presented the question of whether a circuit court could review a pre-transfer order of a transferee district court within the same circuit, i.e., the case involved an *intra*-circuit transfer rather than an *inter*-circuit transfer, which is not involved in the present case. *Posnanski's* treatment of the decisions in *American Fidelity* and *Magnetic Eng'g & Mfg. Co. v. Dings Mfg. Co.* demonstrates that those decisions do not establish the circuit conflict Petitioners advance. *American Fidelity* and *Magnetic Eng'g & Mfg. Co. v. Dings Mfg. Co.* do not, contrary to Petitioners' submission, stand for the proposition that a transferee circuit court has appellate jurisdiction to review all decisions of transferor district courts located outside the reviewing court's circuit.

Finally, Petitioners' rely on *Asarte Shipping Co.* for its assertion that the underlying concept for appellate authority to review pre-transfer orders is that the transfer of a case ships it out to the transferee district court lock, stock, and barrel. This rule, however, only applies to unique cases

involving a § 1407 case adjudicated by the multidistrict litigation panel and is inapplicable to other transfers, including the transfer that occurred in this case. Under section 1407(b), the judge to whom a multidistrict case is assigned "may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings." *In re Corrugated Container Anti-Trust Litigation,* 620 F.2d 1086, 1090-1091 (5th Cir.-OLD 1980). In *In re Corrugated Container Anti-Trust Litigation,* a § 1407 case adjudicated by the multidistrict litigation panel, the old Fifth Circuit expressly limited the rule Petitioners rely upon to § 1407 cases (which the present case is not):

> *If [this case] were not a section 1407 multidistrict case*, then there could be no question that a [contempt order] . . . would have to be issued by the District Court for the Southern District of New York . . . an appeal from that contempt order would be proper *only* in the Second Circuit Court of Appeals, 'the court of appeals for the circuit embracing the district' in which the reviewable decision was rendered. 28 U.S.C. § 1294 (1976).

620 F.2d at 1090.

For the reasons stated above, there is no circuit conflict that merits this Court's certiorari review, and the Petition should be denied.

II. The Facts Of This Case Make It A Poor Vehicle For Supreme Court Review Of *Asahi Metal's* Stream of Commerce Theory

Even were the Court to find a certworthy conflict, the facts of this case make it a poor vehicle for review of *Asahi Metal*'s stream of commerce analyses. The Court should not grant a petition where review could have no real effect on the decision below. Because the lower courts in this case, as in *Asahi Metal*, found that personal jurisdiction would be unreasonable, even *assuming the existence of minimum contacts,* due to the international context and foreign residence of this Austrian Respondent, the Court's adoption in this case of a different view of stream of commerce would be inconsequential in the lawsuit.

Although the *Asahi Metal* Court was divided on the stream of commerce theory and level of minimum contacts necessary to support personal jurisdiction, the Court found it unnecessary to choose any one test for minimum contacts because it decided the case based on the second prong of the jurisdictional Due Process analysis, i.e., whether the exercise of jurisdiction over the defendant is reasonable. All Justices agreed that *even assuming minimum contacts*, it was unreasonable to subject the Japanese component manufacturer to suit in California when neither the plaintiff nor the forum state had any significant interest and the exercise of jurisdiction would place a severe burden on the foreign defendant. *Asahi Metal*, 480 U.S. at 114.

The similarity of the facts of this case and those of *Asahi Metal* militate against the Court's review here. In *Asahi Metal*, a California plaintiff injured in a motorcycle accident in California filed a products liability suit in California against Cheng Shin, a Taiwanese manufacturer of tire tubes, who then cross-claimed against Asahi, a Japanese manufacturer of tire valve assemblies located in Japan. *Id.* at 107. Asahi had not solicited any business in California and

had no offices, agents or property there. It sold its tube assemblies to Cheng Shin in Taiwan and had no control over the distribution system that resulted in the incorporation of its components into other products eventually sold in California. *Id.* at 108. The California Supreme Court sustained jurisdiction over Asahi, concluding that Asahi knew some of its valve assemblies would be incorporated into tire tubes sold in California and benefited indirectly from the sale of products incorporating its components in California. *Id.*

Applying the factors articulated by the Court in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 292 (1980), the *Asahi* Court ultimately found that even assuming the existence of minimum contacts, the exercise of jurisdiction over Asahi would be unreasonable *Id.* at 114. In reaching its decision, the Court weighed "the burden on the defendant, the interests of the forum State . . . the plaintiff's interest in obtaining relief . . . the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies." *Id.* at 114..

Question 1b of the Petition asks the Court to decide "which view of stream of commerce in *Asahi Metal* is to be applied to the issue of specific personal jurisdiction?" As discussed above, although this very question divided the *Asahi Metal* Court and created the need for separate plurality opinions, it was ultimately superfluous, since the Court based its holding upon the conclusion that asserting jurisdiction over the Japanese defendant would be unreasonable. Petitioners request the Court adopt the views expressed by Justice Brennan and Justice Stevens in their concurring opinions. Pet. at 17. However, the opinions of these Justices lead the Court to the conclusion that should be reached in this case:

> An examination of minimum contacts is not always necessary to determine whether a state court's assertion of personal jurisdiction is constitutional . . . after considering the factors set forth in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 292 (1980), that California's exercise of jurisdiction over Asahi in this case would be "unreasonable and unfair." *This finding alone requires reversal*; this case fits within the rule that "minimum requirements inherent in the concept of 'fair play and substantial justice' may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities." *Burger King*, 471 U.S. at 477-478 (quoting *International Shoe Co.* v. *Washington*, 326 U.S. 310, 320 (1945)). Accordingly, I see no reason in this case . . . to articulate . . . any . . . test as the nexus between an act of a defendant and the forum State that is necessary to establish minimum contacts.

Id. at 110 (Stevens, J., concurring). *See also Id.* at 107 (Brennan, J., concurring) ("I . . . agree . . . with the Court's conclusion in Part II-B that the exercise of personal jurisdiction over Asahi in this case would not comport with 'fair play and substantial justice.")

Petitioners assert the New Jersey Court applied a "restrictive reading of only the plurality opinion from *Asahi Metal*" and urge this Court to adopt Justice Brennan's and Justice Stevens' views of stream of commerce for determining whether minimum contacts exist with the forum state. Although the New Jersey Court adopted Justice O'Connor's stream of commerce view because Petitioners

argued that defendants engaged in "additional conduct" in New Jersey, the court also expressly considered the views of Justice Brennan and Justice Stevens. The court made it expressly clear that even if it had adopted Justice Brennan's or Justice Stevens' approach it would still have found a lack of personal jurisdiction over defendants because the exercise of jurisdiction would be unreasonable and offend traditional notions of fair play and substantial justice.[3] Thus, there is no practical reason to revisit the *Asahi Metal* stream of commerce theories in this case, or of the determination of the New Jersey District Court that there was no personal jurisdiction over Respondent.

Some circuits have adopted one view of minimum contacts via the stream of commerce over another. *Compare, e.g., Barone v. Rich Brothers Interstate Display Fireworks Company*, 25 F.3d 610, 613-15 (8th Cir. 1994) (adopting a position consistent with that of Justice Brennan) and *Ruston Gas Turbines, Inc. v. Donaldson Company*, 9 F.3d 415 (5th Cir. 1993) (same) with *Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671 (1st Cir. 1992) (adopting a position consistent with that of Justice O'Connor) and *Madara v. Hall*, 916 F.2d 1510, 1519 (11th Cir. 1990) (same).

Most courts of appeals, however, have avoided choosing one position over the other and have instead decided cases based on the facts in the record. See, e.g.,

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[3] Pet. App. 38a-39a. As set forth in Respondent's Statement of the Case, the court recognized Respondent is a foreign corporation with its principal place of business, employees and documents located in Austria. Further, the court noted the unique burden on the Respondent of defending itself in a foreign legal system would carry significant weight in assessing the reasonableness of the exercise personal jurisdiction . Finally, the court found Petitioners' interests in litigating their claim in New Jersey were minimal because they filed suit for the same relief in Florida.

Beverly Hills Fan Company v. Royal Sovereign Corporation, 21 F.3d 1558, 1566 (Fed. Cir. 1994); *Tobin v. Astra Pharmaceutical Products, Inc.*, 993 F.2d 528, 543 (6th Cir. 1993); *Vermeulen v. Renault*, U.S.A., Inc., 985 F.2d 1534, 1548 (11th Cir. 1993); *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 382 n.3 (9th Cir. 1990), rev'd on other grounds, 499 U.S. 585 (1991).

The Third Circuit has not adopted a single view of the stream of commerce analysis but has decided personal jurisdiction cases based on the facts in the record, considering whether the exercise of jurisdiction over a defendant would be reasonable. *See Pennzoil Prods. Co. v. Colelli & Assocs.*, 149 F.3d 197, 208 (3d Cir. 1998) (exercising jurisdiction over Ohio defendants would accord with notions of "fair play and substantial justice," noting "[t]his is not a case where a severe burden is placed on an alien defendant as in *Asahi [Metal]*"); *Interfirst Bank Clifton v. Fernandez*, 844 F.2d 279, 292 (5th Cir. 1988) ("[t]he situation is unlike that in Asahi[Metal], where the defendant, a Japanese corporation, would have had to travel to California and contend with a foreign legal system. [The defendant in this case] was asked only to travel to a neighboring state.")

In view of the similarity between the facts of this case and those in *Asahi Metal*, the decisions of the Eleventh Circuit and the New Jersey District Court do not warrant this Court's review. As in *Asahi Metal*, the application of the reasonableness factors in this case tip the constitutional balance in favor of New Jersey's and Florida's lack of personal jurisdiction over Respondent. Respondent is an Austrian corporation with its principal place of business, employees and documents located outside of the United States in Austria. It manufactures its engines in Austria and sold the subject engine to Kodiak in Austria. Although Respondent knew Kodiak might distribute the subject engine in South America, Central America or the United States, it

has no knowledge of, or control over, the distribution of the engines after they are sold in Austria. Thus, Respondent was not aware its engine would end up injuring someone in the state of New Jersey. Under the Court's decision in *Asahi Metal*, it would be unreasonable to subject Respondent to suits in New Jersey and Florida.

III. The Eleventh Circuit Properly Applied This Court's Settled Precedent In Finding The Florida District Court Lacked Personal Jurisdiction Over Respondent

Petitioners' assert the Eleventh Circuit Court of Appeals erred because it applied the reasonableness test of Part II-B of *Asahi Metal* to its analysis of general personal jurisdiction. By this characterization of the Due Process reasonableness requirement, Petitioners misunderstand this Court's well-settled precedent.

A review of the Court's decisions addressing general jurisdiction reveals the "reasonableness test" that the Eleventh Circuit applied below did not originate from *Asahi Metal* but has been applied by the Court for decades in general jurisdiction cases. In *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 414 (U.S. 1984), the Court analyzed whether Texas had general personal jurisdiction over a Colombian defendant. The Court stated the test to be adopted as follows:

> "[d]ue process requirements are satisfied when in personam jurisdiction is asserted over a nonresident corporate defendant that has certain minimum contacts with the forum such that the maintenance of the suit *does not offend traditional notions of fair play and substantial justice* . . .; When a controversy is related to or "arises out of" a

> defendant's contacts with the forum, the Court has said that a 'relationship among the defendant, the forum, and the litigation' is the essential foundation of *in personam* jurisdiction. *Shaffer* v. *Heitner*, 433 U.S. 186, 204 (1977).

See also Perkins v. *Benguet Consolidated Mining Co.*, 342 U.S. 437, 438 (1952) (finding the foreign corporation, through its president, "[had] been carrying on in Ohio a continuous and systematic, but limited, part of its general business," and the exercise of general jurisdiction over the Philippine corporation by an Ohio court was "reasonable and just"). Thus, it is well-settled that courts must determine whether general personal jurisdiction offends traditional notions of fair play and substantial justice.

In the present case, the Eleventh Circuit appropriately applied the reasonableness analysis in a general jurisdiction case. It followed the reasonableness factors in *Helicopteros* and analyzed the relationship among the Respondent, the forum, and the litigation and held that even assuming Respondent's contacts with Florida were sufficient to warrant jurisdiction, the exercise of general jurisdiction would offend traditional notions of fair play and substantial justice. The Eleventh Circuit held: "[t]he only contact the subject engine had with Florida is that a Florida corporation received shipment of the engine in Florida for delivery to a Mississippi corporation who then delivered the engine to a New Jersey purchaser. The contact of these international Defendants with Florida in terms of *this engine* is even more removed." Pet. App. 8a. Thus, the Eleventh Circuit's decision that general personal jurisdiction in Florida would be unreasonable over Respondent adhered to this Court's well-settled precedent and does not require review by this Court.

Finally, Petitioners' claim this Court should resolve the "conflict" among the circuits regarding which party has the burden of proof to establish the reasonableness of the exercise of jurisdiction over a defendant, once the court finds general personal jurisdiction exists. However, Petitioners cite only two circuit decisions in support this "conflict," and Respondent respectfully submits the Court need not reach this issue because the circuit courts have not sufficiently treated it and since the Eleventh Circuit correctly held general personal jurisdiction over the Respondent in Florida would be unreasonable. "The Court is only interested in conflicts which its decision in a particular case will remove." *See* Frankfurter and Hart, *The Business of the Supreme Court at the October Term*, 1933 Harvard L. Rev. 238, 268 (1934) *Accord* 23 Moore's Federal Practice § 510.21[3][a] (3d ed. 1991).

CONCLUSION

For the foregoing above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

THEODORE KOZIOL and LOIS KOZIOL, Plaintiffs, v. BOMBARDIER-ROTAX GmbH, BOMBARDIER INC., KODIAK RESEARCH LTD., and ROTECH RESEARCH CANADA LTD. a/k/a KODIAK RESEARCH CANADA, LTD., Defendants.	CIVIL ACTION NO. 00-1938 (GEB) **MOTION TO MODIFY THE ORDER OF APRIL 24, 2003, DISMISSING THE COMPLAINT FOR LACK OF PERSONAL JURISDICTION**

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PLEASE TAKE NOTICE that on ___, at 10 a.m. or as soon thereafter as counsel may be heard, counsel for plaintiffs will move, pursuant to Fed.R.Civ.P. 59(e) and, alternatively pursuant to Fed.R.Civ.P. 60(b), before the Honorable Garrett E. Brown, Jr., U.S.D.J., of the United States District Court for the District Court of New Jersey, in the Clarkson S. Fisher Federal Building and Court House in Trenton, New Jersey, for an order vacating the order of April 24, 2003, which dismissed the plaintiffs' complaint for lack of personal jurisdiction and for an order transferring this case to the Southern District of Florida.

In support of this motion, counsel for plaintiffs shall rely upon the brief attached hereto.

/s/ George G. Campion
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May 5, 2003

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

THEODORE KOZIOL and LOIS KOZIOL, Plaintiffs, v. BOMBARDIER-ROTAX GmbH, BOMBARDIER INC., KODIAK RESEARCH LTD., and ROTECH RESEARCH CANADA LTD. a/k/a KODIAK RESEARCH CANADA, LTD., Defendants.	CIVIL ACTION NO. 00-1938 (GEB)

PLAINTIFFS' MEMORANDUM OF LAW IN SPORT OF THEIR MOTION, PURSUANT TO FED. R. CIV. P. 59(e) AND FED. R. CIV. P. 60(b), FOR RELIEF FROM THE DISMISSAL ORDER ENTERED ON APRIL 24, 2003

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I. INTRODUCTION

Plaintiffs Theodore Koziol and Lois Koziol submit this memorandum of law in support of their motion, pursuant to Fed.R.Civ.P. 59(e) and Fed.R.Civ.P. 60(b)(6), to modify the Court's order dismissing their complaint for lack of personal jurisdiction.

This motion is filed solely as a matter of prudence to forestall the possibility of a claim by the defendants in an

identical action filed in Florida that the complaint is barred by a statute of limitations in Florida. The modest relief the plaintiffs seek in this motion does not change the substance of the Court's ruling that personal jurisdiction over the defendants is not proper in New Jersey. Instead, the relief sought is to modify the order from a dismissal of the complaint for lack of personal jurisdiction to an order transferring the New Jersey action to the district court for the Southern District of Florida where the identical complaint is filed.

This relief, if granted, preserves the essence of the Court's ruling on lack of jurisdiction in New Jersey. This relief is permitted by three sections of the United States Code, 28 U.S.C. § 1404(a), 28 U.S.C. 1§ 406(a) and 28 U.S.C. § 1631.

II. THE PROCEDURAL HISTORY

This action arises from the crash of an ultralight aircraft powered by a Rotax 582UL engine on March 20, 1999 in New Jersey. Plaintiffs filed the complaint against defendants Bombardier-Rotax, GmbH ("Rotax"), Kodiak Research, Ltd. ("Kodiak"), and Rotech Research Canada ("Rotech") on April 24, 2000.

Each defendant moved to dismiss the complaint for lack of personal jurisdiction in District of New Jersey. The Court ordered jurisdictional discovery, which ended on December 23, 2002. The plaintiffs filed a saving action against the defendants in Florida on December 30, 2002.

The Court heard oral argument on the motion on March 3, 2003, and reserved its decision. On April 24, 2003, the Clerk of the Court entered the order dismissing

the plaintiffs' complaint for lack of personal jurisdiction over Rotax, Rotech, and Kodiak.

III. THE CONTROLLING LEGAL STANDARDS

Three sections of the United States Code, 28 U.S.C. § 1404(a), 28 U.S.C. § 1406(a) and 28 U.S.C. § 1631, permit a court to transfer an action to another jurisdiction.

Two sections of the Federal Rules of Civil Procedure, Fed.R.Civ.P. 59(e) and Fed.R.Civ.P. 60(b), authorize a Court to reconsider and to modify an order.

In this case, the plaintiffs request that the Court rely on one or more sections of the United States Code permitting the transfer of an action to another jurisdiction and that the Court proceed under Fed.R.Civ.P. 59(e) and Fed.R.Civ.P. 60(b) and modify the April 24, 2003 order dismissing the plaintiffs' complaint for lack of personal jurisdiction.

When the exercise of jurisdiction is found to be improper, 28 U.S.C. § 1631 says:

> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it

was actually filed in or noticed for the court from which it is transferred.

In order to cure a defect in jurisdiction or venue, 28 U.S.C. § 1406(a) says, "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." When venue is found to be improper, 28 U.S.C. § 1404(a) says, "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

The authority allowing the plaintiffs to present a motion relying on 28 U.S.C. § 1404(a), 28 U.S.C. § 1406(a) and 28 U.S.C. § 1631 to transfer this action comes from either Fed.R.Civ.P. 59(e) or Fed.R.Civ.P. 60(b).

"The Third Circuit has sometimes ruled on such motions under Federal Rule of Civil Procedure 59(e) and at other times under Rule 60(b). A motion to reconsider may, therefore, be treated as a Rule 59(e) motion for amendment of judgment or a Rule 60(b) motion for relief from judgment or order." *Broadcast Music, Inc. v. La Trattoria E., Inc.*, No. CIV.A. 95-1784, 1995 WL 552881, at *1 (E.D. Pa. Sept. 15, 1995).

When the motion is made pursuant to Fed.R.Civ.P. 59(e), "A motion to alter or amend a judgment may only be granted if: (1) an intervening change in the controlling law has occurred, (2) evidence not previously available has become available, or (3) it is necessary to correct a clear error of law or to prevent manifest injustice." *A.K. Stamping Co., Inc. v. Instrument Specialties Co., Inc.*, 106 F.Supp.2d 627, 667 (D.N.J. 2000). Here, the purpose of the

motion is to prevent the possibility of a manifest injustice by a dismissal of the Florida complaint.

The basis for the motion under Fed.R.Civ.P. 60(b)(6) is the catch-all provision "any other reason justifying relief from the operation of the judgment."

IV. ARGUMENT IN SUPPORT OF MOTION

A. The Florida Law on the Statute of Limitations.

As stated above, the crash of the ultralight aircraft occurred on March 20, 1999 in New Jersey and the complaint was filed in the district court on April 24, 2000, which is within the two-year statute of limitations for personal injury actions under N.J.S.A. 2A:14-2.

Florida has a four-year statute of limitations for personal injury actions, Fla. Stat. Ann. § 95.11(4)(e). The protective action was filed in the Southern District of Florida on December 30, 2002. Consequently, the complaint in the district court for the Southern District of Florida was filed within the four-year statute of limitations since the injury occurred on March 20, 1999.

Florida has a separate statute of limitations for those cases in which the cause of action arose in another state. Florida law will not permit a plaintiff to file a complaint in Florida if the cause of action arose in another state where the cause of action is barred by that state's statute of limitations. Fla. Stat. Ann. § 95.10, says, "When the cause of action arose in another state or territory of the United States, or in a foreign country, and its laws forbid the maintenance of the action because of lapse of time, no action shall be maintained in this state." A district court

judge in Florida explained the rationale for this statute. "The purpose of the borrowing statute [Fla. Stat. Ann. § 95.10] is to prevent forum shopping. . . . So, if the cause of action arose in another state whose statute of limitations would bar the claims, Florida courts will 'borrow' the other state's statute of limitations, barring the action." *Jaisinghani v. Capital Cities/ABC, Inc.*, 973 F. Supp. 1450, 1452 (S.D. Fla. 1997) (internal citations omitted).

The complaint filed in the district court for the Southern District of Florida on December 30, 2002, was filed within the four-year statute of limitations. The complaint will not be barred by Fla. Stat. Ann. § 95.10, because the Court did not dismiss the complaint filed in New Jersey because it was filed after the statute of limitations in New Jersey expired. The Court dismissed the complaint because of lack of personal jurisdiction in New Jersey over the defendants. The Court did not dismiss the complaint because it was filed after the two-year statute of limitations in New Jersey for personal injury actions had run.

That said, prudence dictates the filing of this motion in order to forestall the possibility of a motion to dismiss the complaint in Florida based upon Fla. Stat. Ann. § 95.10.

If the Court exercises its power to transfer the complaint to the Southern District of Florida, the defendants will not be able to claim that the action filed in Florida is untimely.

B. The Authority to Transfer this Complaint to Florida.

The holding of United States Supreme Court in *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 465-66, 82 S.Ct.

913, 915-16, 8 L.Ed.2d 39 (1962), shows that this Court has the authority under 28 U.S.C. § 1406(a) to transfer the complaint to the district court for the Southern District of Florida.

In *Goldlawr,* a district court in Pennsylvania found that it did not have jurisdiction over a private antitrust action and relied on 28 U.S.C. § 1406(a) to transfer the lawsuit to the Southern District of New York. 369 U.S. at 464. The district court judge in New York found that, since the district court judge in Pennsylvania lacked personal jurisdiction over the defendants, he lacked the statutory authority to transfer the case to New York. *Id.* at 464-65. The Court of Appeals for the Second Circuit affirmed the district court judge's decision. *Id.* at 465. The Supreme Court reversed and permitted the transfer under 28 U.S.C. § 1406(a).

> Nothing in that language [of 28 U.S.C. § 1406(a)] indicates that the operation of the section was intended to be limited to actions in which the transferring court has personal jurisdiction over the defendants. . . . Indeed, this case is itself a typical example of the problem sought to be avoided, for dismissal here would have resulted in plaintiff's losing a substantial part of its cause of action under the statute of limitations merely because it made a mistake in thinking that the respondent corporation could be "found" or that they "transact" business in the Eastern District of Pennsylvania.
>
> *The language of § 1406(a) is amply broad enough to authorize the transfer of cases, however wrong, the plaintiff may have been in filing his case as to venue, whether the court in which it was filed had personal jurisdiction over the defendants*

> *or not.* The section is thus in accord with the general purpose which has prompted many of the procedural changes of the past few years – that of removing whatever obstacles may impede an expeditious and orderly adjudication of cases and controversies on their merits.

Id. at 465-67 (emphasis added).

The procedural posture in *Goldlawr* is similar to the procedural posture in this case. The plaintiffs filed the lawsuit in the District of New Jersey under a mistaken belief that the defendants could be found to have transacted business in New Jersey. This Court, having found that filing the lawsuit in New Jersey was mistaken, has the authority to transfer the case to the District of Florida.

On its face, 28 U.S.C. § 1631 also permits the transfer for want of personal jurisdiction, because it says if the "court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed."

There is, however, a split of authority whether 28 U.S.C. § 1631 applies only to lack of subject matter jurisdiction. Some Courts have found it only applies to cases in which subject matter jurisdiction is lacking. *McTyre v. Broward Gen. Medical Center*, 749 F.Supp. 102, 105 (D. N.J. 1990) (although on its face 28 U.S.C. § 1631 makes no distinction between subject matter jurisdiction and personal jurisdiction, the legislative history indicates that the section was only intended to apply in cases where no subject matter jurisdiction exists); *Nose v. Rementer*, 610 F.Supp. 191 (D. Del. 1985) (finding the legislative history

of 28 U.S.C. § 1631 appears to apply only to cases in which the transferor court lacks subject matter jurisdiction).

In the District of New Jersey, Judge Orlofsky found that 28 U.S.C. § 1631 can be used to transfer a case when personal jurisdiction is found lacking. *Chicosky v. Presbyterian Medical Center*, 979 F.Supp. 316, 319 (D. N.J. 1997) (in the interest of justice, an action can be transferred for lack of personal jurisdiction pursuant to 28 U.S.C. §§ 1404(a) and 1631). *See also, Renner v. Lanard Toys, Ltd.*, 33 F. 3d 277, 284 (3rd. Cir. 1994) (suggesting that a district court finding lack of personal jurisdiction may transfer the case pursuant to 28 U.S.C. § 1631).

If the Court wishes to rely on Judge Orlofsky's reasoning in *Chicosky*, the interest of justice test under 28 U.S.C. § 1631 is met. The interest of justice is served by seeing that the plaintiffs have the right to have the chance to prevail on their claims. The ultimate decision whether the plaintiffs can prevail on their claims will be reserved for a later day.

The United States Supreme Court has recognized the unfairness of barring a plaintiff's action solely because a prior action that is filed within the statute of limitations is dismissed in one court and later filed in another court. *Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 430, 85 S. Ct. 1050, 1055 (1965). In *Burnett*, a FELA action, timely filed in state court, was dismissed because venue was improper and then filed in federal court. 380 U.S. at 425. The district court dismissed the identical complaint because it was filed after the end of the limitations period in FELA. *Id.* The Supreme Court then held:

> Both federal and state jurisdictions have recognized the unfairness of barring a plaintiffs action solely because a prior timely action is dismissed for improper venue after the applicable statute of limitations has run. In both federal and state systems of justice rules have been devised to prevent this from happening.

Id. at 430.

IV. CONCLUSION

In this case, this lawsuit was timely filed in New Jersey. As the Court knows, the defendants vigorously contested the issue of whether jurisdiction was proper in New Jersey. The Court dismissed the complaint for lack of jurisdiction – not for lack of merit.

As a matter of prudence, the plaintiffs must assume that the defendants will contest jurisdiction in Florida. Consequently, the plaintiffs must now take whatever steps are possible to protect against the possibility that the defendants will argue that Fla. Stat. Ann. § 95.10 bars their complaint. The rationale for modifying the order from an order dismissing the complaint for lack of personal jurisdiction to an order transferring the complaint to Florida is to provide the plaintiffs with added protection that they will not face a claim that jurisdiction is improper in the Southern District of Florida because the complaint was not timely filed in Florida.

Transferring this case to Florida will not change the substance of this Court's finding of lack of jurisdiction in New Jersey and will provide the plaintiffs with protection if the defendants challenge the complaint in Florida. Whether the plaintiffs succeed or fail on the merits of their

claim is not at issue here. What is at issue is their right to have the chance to succeed or fail on the merits.

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APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

THEODORE KOZIOL and LOIS KOZIOL, Plaintiffs, v. BOMBARDIER-ROTAX Gmbh MOTORENFABRIK; BOMBARDIER INC., KODIAK RESEARCH LTD., and ROTECH RESEARCH CANADA LTD. a/k/a KODIAK RESEARCH CANADA, LTD. Defendants.	Civ. No. 00-1938 (GEB) **ORDER** (Filed April 24, 2003)

This matter comes before the Court upon the motions to dismiss by defendants, Bombardier-Rotax Gmbh Motorenfabrik; Bombardier Inc., Kodiak Research Ltd., and Rotech Research Canada, Ltd. a/k/a Kodiak Research Canada, Ltd. on plaintiffs' complaint; and the Court having considered the parties' submissions; and having heard oral argument on March 3, 2003; and for the reasons stated in the Memorandum Opinion accompanying this order;

IT IS this 23rd day of April, 2003;

ORDERED that defendants' motions to dismiss are GRANTED; and it is further

ORDERED that the clerk should mark this case CLOSED.

/s/ Garrett E. Brown, Jr.
GARRETT E. BROWN, JR.,
U.S.D.J.

(4)

No. 05-633

SUPREME COURT, U.S.
FILED
FEB 24 2006
OFFICE OF THE CLERK

In The Supreme Court of the United States

THEODORE KOZIOL and LOIS KOZIOL,

Petitioners,

vs.

BOMBARDIER-ROTAX GmbH MOTORENFABRIK; KODIAK RESEARCH, LTD.; ROTECH RESEARCH CANADA, LTD . a/k/a KODIAK RESEARCH CANADA, LTD.; AERO DISTRIBUTION LIMITED; AERO DISTRIBUTION INTERNATIONAL LIMITED; and PASCAL RONVEAUX,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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QUESTIONS PRESENTED

1. a. *Whether a regional circuit court of appeals, in an appeal from a final judgment by a transferee district court, can provide appellate relief involving a pre-transfer ruling by a transferor district court located in another regional circuit?*

(The United States Court of Appeals for the Eleventh Circuit has answered this Question in the negative, as has the United States Court of Appeals for the Tenth Circuit. The United States Courts of Appeals for the Second, Fifth, Sixth, and Ninth Circuits have answered this Question in the affirmative.)

b. *If (a) is answered in the affirmative, which view of "stream of commerce" in Asahi Metal is to be applied to the issue of specific personal jurisdiction?*

(The United States Courts of Appeals for the First, Sixth, and Eleventh Circuits have applied Justice O'Connor's four-justice plurality opinion, while the United States Court of Appeals for the Eighth Circuit has applied both Justice Brennan's four-justice concurring opinion and Justice Stevens' three-justice concurring opinion, and the United States Courts of Appeals for the Third, Fifth, and Ninth Circuits have avoided having to follow any specific one of the three opinions in *Asahi Metal*.)

2. *Whether the reasonableness analysis under Asahi Metal, a specific personal jurisdiction case, applies to a case asserting general personal jurisdiction; and if so, whether the defendant has any burden of proof?*

(The United States Court of Appeals for the Eleventh Circuit has answered the initial Question in the affirmative, and the

QUESTIONS PRESENTED – Continued

second in the negative. The United States Courts of Appeals for the Second, Fourth, Eighth, and Ninth Circuits have answered the initial Question in the affirmative, although the Ninth Circuit answers the second Question in the affirmative, while the Eighth Circuit answers in the negative.)

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REPLY BRIEF OF PETITIONER

Pursuant to SUP.CT.R. 15.6, Petitioners hereby respond to the Brief in Opposition by Kodiak and by Rotax.

A. REVIEW BY REGIONAL CIRCUIT OF PRE-TRANSFER ORDER BY TRANSFEROR DISTRICT COURT LOCATED IN A DIFFERENT REGIONAL CIRCUIT

Kodiak, in its Brief in Opposition, at 7, states:

> Contrary to the assertion of Petitioners, the circuits are unanimous that the appellate review of a transfer order entered by a transferor district court located in a different regional circuit may not be the subject of a direct appeal in the transferee circuit.

This is a new matter for the simple reason that it misses the point. Petitioners seek review of a pre-transfer order, and not review of the transfer order itself. Thus, Argument I, at 7-11 of Kodiak's Brief in Opposition on appellate review of a transfer order, is irrelevant to the issues before the Court.

Kodiak, in its Brief in Opposition, at 11-13, raises a new contention that Petitioners have waived the right to have appellate review of the order determining jurisdiction in the New Jersey District Court because they sought to have the case transferred instead of dismissed. This misses the point that the jurisdictional ruling stayed the same, which is exactly what Petitioners stated in their legal memorandum in support of that motion in the New Jersey District Court. *See* Resp. App. 6a of Rotax Brief in

Opposition. The issue was not waived, but instead was preserved.

Rotax raises a new issue, in its Brief in Opposition, at 15-17, that there is a distinction between review of pre-transfer orders that are non-appealable interlocutory orders and other pre-transfer orders that are immediately appealable. With all due respect, Petitioners submit that their review of the cases cited both by Rotax and by Petitioners do not support this distinction on the issue of appealability of the pre-transfer order following transfer. However, Rotax makes an interesting point, which actually supports the reasons for this Court granting the Petition for Writ of Certiorari, so that the Court may speak clearly on which pre-transfer orders are subject to appellate review in the regional circuit having jurisdiction over the transferee district court.

B. GENERAL JURISDICTION

On Page 18 of Kodiak's Brief in Opposition, Kodiak states that the Eleventh Circuit determined that Dr. and Mrs. Koziol did not establish specific jurisdiction or general jurisdiction, and that having failed to establish the first prong of that test, there was no need for the Eleventh Circuit to consider any further jurisdictional analysis. This is incorrect. Although the Eleventh Circuit doubted there was general jurisdiction under the Florida statute, its *holding* was based on the lack of relationship between the specific aircraft engine and Florida. Pet. App. 7a-8a. However, the Eleventh Circuit focused on the relationship between Kodiak and Rotax on the one hand, and the Florida dealer on the other hand, not on the relationship between Rotax and Kodiak, and not on the extensive

contacts within the State of Florida by both Rotax and Kodiak. *See id.*

Because the focus of general jurisdiction is on the extensive business activity of the defendant corporations in Florida, and not on the individual incident giving rise to the tort action, both Respondents, Kodiak and Rotax, are in error, as is the Eleventh Circuit, when they look to Part II-B of *Asahi Metal*[1] to dismiss this case on the ground that the single engine had no significant contact with Florida.[2] This position is inherently inconsistent with the concept of general jurisdiction described in the *Helicopteros*[3] and *Benguet Consolidated Mining*[4] cases by this Court.

Neither Rotax nor Kodiak contest the extensive facts showing general jurisdiction over each of them in Florida. More particularly, Kodiak does not contest the factual basis for Petitioners' contention of general jurisdiction that (1) senior executives/managers of Kodiak came into Florida to further the business interests of Kodiak in Florida; (2) Kodiak provided logos and display engines to its Florida dealer for use at the Fun 'N Sun airshow in Florida; (3) Kodiak maintained its own booth at the airshow in Florida; (4) Kodiak performed support services for its dealers in Florida; (5) Kodiak provided logos and approval for advertising by the Florida dealer; (6) every one of the

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[1] *Asahi Metal Industry Co., Ltd. v. Superior Court of Calif., Solano Co.*, 480 U.S. 102 (1987).

[2] Respondent Bombardier-Rotax GmbH Motorenfabrik's Brief in Opposition to Petition for Certiorari ["Rotax Brief in Opposition"], at 27.

[3] *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984).

[4] *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952).

ultralight engines that Kodiak sells to its U.S. dealers enters the United States through Florida; (7) Kodiak actively engages in marketing in Florida and required its dealers to show only Rotax products at the Sun 'N Fun airshow in Florida; (8) Kodiak reimburses the Florida dealer, as well as other dealers, for warranty services; (9) Kodiak has itself sold engines (albeit water damaged) in Florida; (10) the CEO of Kodiak has a maildrop for U.S. mail in Florida.[5]

Likewise, Rotax has not disputed the factual basis for the exercise of general jurisdiction over it: (1) Rotax controls and supervises the marketing efforts of Rotax products in Florida, including visits by a Rotax senior executive to the airshow in Florida for purposes of advancing sales of Rotax engines; (2) Rotax handles service and warranty inquiries from Florida passed on by Kodiak; (3) Rotax has tens of thousands of various engines sold in Florida, including engines for SeaDoos, ATVs, and Abrilla motorcycles; (4) All of Rotax's ultralight aircraft engines enter the United States through Florida; (5) Rotax gave Kodiak a territory that includes each State in the United States of America, which thus includes Florida; (6) Rotax has a mandatory requirement for the approval of Rotax logos in advertising by the Florida dealer; (7) Rotax had registered its logo and word mark with the U.S. Patent and Trademark Office; and (8) Rotax had obtained certification of many of its aircraft engines from the U.S. Federal Aviation Administration.[6]

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[5] *See* Petition for Writ of Certiorari, at 5-10 & 24-26.

[6] *See* Petition for Writ of Certiorari, at 4-10 & 24-26.

Finally, both Rotax in its Brief in Opposition at 28, and Kodiak in its Brief in Opposition at 18-20, do not address how the split in the Circuits should be handled, but simply ask the Court to ignore same.

CONCLUSION

For the foregoing reasons, Petitioners respectfully submit that their Petition is well taken and should be granted with regard to the issues presented for review.

Respectfully submitted,

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